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## Passion's Progress: Modern Law Reform and the Provocation Defense

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# Articles

## Passion's Progress: Modern Law Reform and the Provocation Defense

Victoria Nourse<sup>†</sup>

How do we understand the death of loved ones at the hands of those with whom they are most intimate? In life as well as law, we say that murders of husbands, wives, and lovers are “crimes of passion.” Thus we explain the event in a way that bridges the gap between love and murder as it separates them, that distances violence from our own homes as it bows to human frailty. This intellectual juggling act yields a law full of ambivalence toward those homicides it describes by the name of “passion.” Doctrine condemns the killings, but with sympathy for the defendant’s situation; theory excuses and justifies the killer, but only partially; verdicts do not acquit, but reduce the sentence from murder to manslaughter.<sup>1</sup> This ambivalence has led to legal

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1. See PETER W. LOW ET AL., *CRIMINAL LAW: CASES & MATERIALS* 884 (2d ed. 1990) (“Today, every state employs some variation of the provocation formula to distinguish between two distinct grades of non-capital criminal homicide.”). In some jurisdictions, passion or provocation reduces an offense from first to second degree murder rather than from murder to manslaughter. See, e.g., WIS. STAT. §§ 939.44(2), 940.01(2)(a) (1996).

reforms promising greater humanity and consistency, promises that have moved lawyers to reject the older talk of “heat of passion” in favor of the more modern “emotional distress.” However well-intentioned, these reforms have led us to change our understandings of intimate homicide in ways that we might never have expected. Our most modern and enlightened legal ideal of “passion” reflects, and thus perpetuates, ideas about men, women, and their relationships that society long ago abandoned.

Based on a systematic study of fifteen years of passion murder cases,<sup>2</sup> this Article concludes that reform<sup>3</sup> challenges our conventional ideas of a “crime of passion” and, in the process, leads to a murder law that is both illiberal and often perverse. If life tells us that crimes of passion are the stuff of sordid affairs and bed side confrontations, reform tells us that the law’s passion may be something quite different. A significant number of the reform cases I studied involve no sexual infidelity whatsoever, but only the desire of the killer’s victim to leave a miserable relationship.<sup>4</sup> Reform has permitted juries to return a manslaughter verdict<sup>5</sup> in cases where the defendant claims passion because the victim left,<sup>6</sup> moved the furniture out,<sup>7</sup> planned a divorce,<sup>8</sup> or sought a protective order.<sup>9</sup> Even infidelity has been transformed under reform’s gaze into something quite different from the sexual betrayal we might

2. My study reviewed hundreds of provocation cases reported by trial and appellate courts between 1980 and 1995. This review led to a data set comprised of every intimate homicide case reporting a provocation claim in jurisdictions that have adopted MODEL PENAL CODE (MPC) § 210.3 (1985) in whole or part. That data set was then compared to samples from jurisdictions adopting traditional and moderate reform regimes. A complete list of the 267 claims involved in this study appears in Appendices B and C.

3. By “reform,” I refer here to those jurisdictions that have either adopted the MPC version of the defense or have significantly liberalized the defense in ways similar to the MPC. As I indicate below, my results regarding separation do not hold in those jurisdictions that have retained a more traditional approach toward the defense. See *infra* Part I.

4. See *id.* (noting that over one-quarter of all cases in my MPC data set involved neither infidelity nor physical violence but, instead, departure or separation prompting a passionate homicide). On separation generally, see Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

5. Under the MPC, a case may not be submitted to a jury unless a rational jury could find that there was a “reasonable explanation or excuse” for the defendant’s claim of “extreme emotional disturbance” (EED). MODEL PENAL CODE § 210.31(b); see also *id.* § 1.07(5) (“The Court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.”).

6. See *State v. Little*, 462 A.2d 117, 118 (N.H. 1983) (reporting that defendant was upset because his wife “didn’t love [him] anymore” and had rejected his attempts at reconciliation, and stating that jury was instructed it could return EED manslaughter verdict).

7. See *State v. Reams*, 616 P.2d 498, 499 (Or. Ct. App. 1980) (reporting that defendant was upset because he had come home to find that his wife had moved and all furniture was gone, and stating that defendant urged EED defense at trial), *aff’d*, 636 P.2d 913 (Or. 1981).

8. See *People v. Guevara*, 521 N.Y.S.2d 292, 293 (App. Div. 1987) (reporting that defendant was enraged because his wife had filed divorce papers, and stating that jury was instructed it could return EED manslaughter verdict).

9. See *Perry v. Commonwealth*, 839 S.W.2d 268, 269–70 (Ky. 1992) (reporting that defendant became enraged when sheriff sought to execute protective order and that EED instruction was given); *Matthews v. Commonwealth*, 709 S.W.2d 414, 418 (Ky. 1985) (reporting that defendant sought to explain his mental state at time of killing by reference to warrants sworn out against him for sexual abuse of his daughter and burglary of his estranged wife’s residence, and stating that defendant urged EED defense at trial).

expect—it is the infidelity of a fiancée who danced with another,<sup>10</sup> of a girlfriend who decided to date someone else,<sup>11</sup> and of the divorcée found pursuing a new relationship months after the final decree.<sup>12</sup> In the end, reform has transformed passion from the classical adultery to the modern dating and moving and leaving. And because of that transformation, these killings, at least in reform states, may no longer carry the law's name of murder.<sup>13</sup>

Reform's understanding of the passion defense<sup>14</sup> reflects deeper roots in modern theories of criminal culpability. Staunchly defended by traditional legal scholarship, these theories center around the notion that defendants are less culpable when they lose "self-control."<sup>15</sup> This sounds plausible and humane, but leaves unanswered an important question: Which losses of self-control merit the law's compassion? By systematically surveying how courts have answered *that* question, this Article argues that adherence to the self-control rationale masks a different, more pernicious, tendency. The law in practice does something more than protect self-control. Courts and lawyers have not measured claims of passion by "quickened heartbeats" or "shallow breathing,"<sup>16</sup> but by judgments about the equities of relationships, judgments

10. See *Dixon v. State*, 597 S.W.2d 77, 78–79 (Ark. 1980) (reporting that defendant became enraged when his fiancée danced with another man and that jury was instructed it could return EED manslaughter verdict).

11. See, e.g., *Rodebaugh v. State*, No. 436, 1990 WL 254365, at \*\*2 (Del. Nov. 27, 1990) (reporting that defendant argued provocation to jury in case in which he killed man who was dating woman defendant had dated a year and a half earlier).

12. For instance, *State v. Wood*, reported a provocation case in which the defendant came upon his ex-wife and her new boyfriend, approximately eight months after "they separated for good," and two months after the divorce had become final. See Brief for Defendant-Appellant at 2, 13–14, *State v. Wood*, 545 A.2d 1026 (Conn. 1988) (No. 12734). Defendant received an EED instruction at trial. See Brief for State of Connecticut-Appellee at B-1, *State v. Wood*, 545 A.2d 1026 (Conn. 1988) (No. 12734); see also *State v. Rivera*, 612 A.2d 749, 750–51 (Conn. 1992) (reporting that defendant received EED instruction in case in which he killed man he believed was having affair with his ex-common law wife three years after she had left).

13. No reform jurisdiction has tried openly to enforce outdated norms of intimate relationships. Indeed, there are appellate cases in reform jurisdictions that seem to cast doubt on whether "leaving" should be considered a reasonable excuse for a passionate homicide. See, e.g., *People v. Casassa*, 404 N.E.2d 1310, 1314 (N.Y. 1980) (affirming bench trial's determination that defendant's emotional reaction to woman's rejection was "peculiar" to him and not "reasonable"). On the other hand, no appellate court that I am aware of in an MPC jurisdiction has ever squarely held that departure or separation is an insufficient basis, as a matter of law, for an EED claim. In fact, as I argue later, juries in MPC jurisdictions (unlike their more traditional counterparts) hear such cases quite often. See Appendix B (listing cases in which juries were instructed on EED in cases involving separation or departure claims).

14. I use the term "passion defense" to refer to the provocation defense in general. Although it may seem archaic, the plain language of many jurisdictions' statutes includes the term "passion." For examples of such statutes, see WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 7.10 n.3 (1986). I use the term "defense" here and throughout this Article in its generic sense as a claim that may reduce punishment, partially or fully. The MPC's own defenses both mitigate and acquit. See, e.g., *MODEL PENAL CODE* § 3.09 (1985) (stating that mistaken self-defense may lead to mitigation). Finally, I use the term "provocation defense" to cover all forms of the defense, whether the traditional "heat of passion" defense or the more modern MPC version known as "extreme emotional disturbance."

15. For a complete explanation of this theoretical approach and its variations, see *infra* Part II.

16. 2 WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 452 (New York, Henry Holt 1890) (espousing behavioral view of emotion, to which reform is thought to aspire).



disguised—and therefore rendered more powerful and resistant to change—by a jurisprudence pretending to make no judgments at all.

Because reform's ideas about intimate loyalties do not lie on the surface, they have survived in the face of obvious conflicts with well-accepted reform movements. Elsewhere, reform has acknowledged, indeed encouraged, women's freedom to divorce or separate. Reform of the passion defense, however, has yielded precisely the opposite result, binding women to the emotional claims of husbands and boyfriends long ago divorced or rejected. Reform in other areas of the law has encouraged battered women to leave their victimizers. Reform of the passion defense, however, discourages such departures, allowing defendants to argue that a battered wife who leaves has, by that very departure, supplied a reason to treat the killing with some compassion.<sup>17</sup> In this upside-down world of gender relations, it should not be surprising to learn that the common law approach toward the provocation defense, deemed an antique by most legal scholars, provides greater protection for women than do purportedly liberal versions of the defense.

Reform not only breeds conflict where gender is concerned; it also breeds conflict within the criminal law itself.<sup>18</sup> Rarely, if ever, does the criminal law embrace defendants who kill in response to a lawful act<sup>19</sup> or trivial slights,<sup>20</sup> and yet passion's reform seems to permit defendants to argue that acts such as leaving or "dancing with another"<sup>21</sup> constitute a "reasonable" explanation meriting our compassion. Rarely, if ever, does the criminal law embrace

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17. See *supra* notes 6–9.

18. It is worth noting that such conflicts are not limited to murder cases but apply to other crimes, such as assault, where provocation remains a defense or partial defense. A minority of states, for example, apply the MPC's EED formula to assault crimes. See, e.g., KY. REV. STAT. ANN. § 508.040 (Banks-Baldwin 1994) (reducing some assaults based on "extreme emotional distress" to class D felonies or class B misdemeanors); *State v. Nunn*, 646 S.W.2d 55, 58–59 (Mo. 1983) (reversing and remanding for retrial for failure to instruct on EED in assault case).

19. For example, under the Model Penal Code, self-defense, defense of property and duress each require a triggering act that is unlawful. See MODEL PENAL CODE §§ 3.04, 3.09 (1985) (providing that self-defense requires actor's belief that force is necessary to protect against use of "unlawful" force); *id.* § 3.06 (providing that defense of property requires actor's belief that force is necessary to prevent "unlawful entry or other trespass"); *id.* § 2.09(1) (providing that duress requires that actor be coerced by use or threat of "unlawful" force). Under section 210.3, however, defendants need not show that they believed that the acts provoking them were unlawful. A few MPC jurisdictions have adopted such a rule, by court decision or by statute, but with uncertain effect on intimate homicide cases. See *infra* text accompanying notes 301–05 (discussing how such rule appears to have had little effect when defendant claimed failure to reconcile as basis for EED claim in New Hampshire).

20. Under the Model Penal Code, self-defense, duress, and necessity require a showing of proportionality between the acts triggering the defense and the defendant's actions. See MODEL PENAL CODE §§ 3.02(1), 3.02(3)c, 3.04(1), 3.04(2)b (providing that use of deadly force to defend property or self must be proportional to force defended against); *id.* § 2.09 (providing that duress defense is unavailable when threat is insufficiently serious); *id.* § 3.02(1)(a) (providing that necessity defense is unavailable when evil sought to be avoided is of less seriousness than law broken in its name). Under section 210.3, defendants need not show that the use of violence was proportionate to the provoking act.

21. See, e.g., *State v. Martinez*, 591 A.2d 155, 156 (Conn. App. Ct. 1991) ("Two weeks before the victim's death, the defendant, the victim's former boyfriend, had seen the victim dancing with another man.").

defendants who are to blame for creating their own defense,<sup>22</sup> and yet some trial courts applying reform's passion defense have found mitigating stress in the defendants' own violent acts, even their own battering.<sup>23</sup> These conflicts have gone largely unnoticed by scholars.<sup>24</sup> Although students of the provocation defense have noted the odd case in which the defense generates absurd results, they have reserved their concern for the lawyer's unlikely hypothetical rather than the real-life lovers' quarrel.<sup>25</sup> Scholarship has focused on different questions, questions about the characteristics of those who kill in these situations.<sup>26</sup> In its focus on identity, this scholarship has made rather obvious normative conflicts within the criminal law all but impossible to see.

Reform's legacy affects both sexes, not one, and any effort to grapple with the defense's weaknesses must acknowledge the complexity of its gender effects. In the cases I have studied, men are by far the most frequent victimizers, and women the most frequent victims. But that does not mean that only women are killed; indeed, it is often the man helping the women leave—the sheriff or the mover or the lover—who dies. Reform often seems to tie women to relationships that they do not want, in effect, enforcing a rule of “emotional unity.”<sup>27</sup> But reform exacts a price from male defendants as

22. See Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 24 (1985) (“[E]very jurisdiction . . . acknowledges that such causing-one's-defense can be relevant to an actor's liability.”) (noting application of this idea to whole host of defenses). Recognizing that under section 210.3 defendants may base an EED claim on conditions that they have created, two states have amended their statutes to prohibit it, but with uncertain consequences in intimate homicide cases. See N.D. CENT. CODE § 12.1-16-01 (1985 & Supp. 1995); OR. REV. STAT. § 163.135(1) (1995).

23. See, e.g., *State v. Traficonda*, 612 A.2d 45, 48–49 (Conn. 1992) (reporting that trial court gave EED instruction in case in which appellate court found that “most” of evidence upon which defendant's claim relied was based on his own battering); *Newell v. Delaware*, No. 269, 1992 WL 53433 (Del. Super. Ct. Mar. 4, 1992) (reporting that defendant stipulated to his own prior bad acts of battering “to use that same evidence to buttress his defense of extreme emotional distress”).

24. See *infra* Part III. Reform's defenders might claim that my argument concerning inconsistency depends upon transforming provocation from a partial excuse to a partial jurisdiction. Cf. Joshua Dressler, Comment, *When “Heterosexual” Men Kill “Homosexual” Men: Reflections on Provocation Law, Sexual Advances, and the “Reasonable Man” Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 749–51 (1995) (dismissing argument that provocation defense is homophobic on grounds that argument transforms defense into justification) [hereinafter Dressler, *Reflections*]. The parallelism that I seek to emphasize does not depend upon comparing the provocation defense to defenses that are complete or partial justifications: Imperfect self-defense and duress, for example, have both been classified as excuses and both require triggering conduct that is unlawful or perceived as unlawful, unlike the EED defense. As Professor Dressler has noted, the idea that provocation should be limited to cases in which the defendant is “not to blame for his anger” is consistent with an excuse theory of provocation. See Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 MOD. L. REV. 467, 475 (1988) [hereinafter Dressler, *Provocation*].

25. Although some scholars have been adamant about the defense's normative character, see, e.g., GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 4.2.1, at 243 (1978), demonstrations of normative conflict are typically reserved for bizarre cases in which defendants are hypothesized to have grown up in terrorist enclaves, see, e.g., PAUL H. ROBINSON, *THE FUNDAMENTALS OF CRIMINAL LAW* 619 (1988).

26. Most MPC scholarship tends to see the important question as one that asks about the personal characteristics of defendants in the situation. See *infra* Part III (discussing liberal focus on identity to answer questions involving provocation defense).

27. To the extent that provocation honors “emotional realities” about relationships after those relationships have ended, it actually extends the merger of women into relationships from the ancient rule

well, albeit one of agency rather than blood. To obtain the law's compassion, men must forsake a claim that they are acting as moral agents and, instead, play the role of the helpless female: dependent, victimized by inarticulate impulse, and utterly incapable of freely determining a proper course of action.<sup>28</sup> One need not celebrate female "states of injury"<sup>29</sup> to see that passion's reforms have imposed upon men and women a "veil of relationship" that neither may have deliberately chosen.<sup>30</sup>

I raise these issues in stark terms not to recommend abolition of the provocation defense but to advocate reconstruction—reconstruction based on a new theory of the law's ambivalence toward some passions. In the end, we do not solve provocation's problems by giving up the law's compassion for sincere emotion,<sup>31</sup> nor by endorsing an abolitionist "ethics of autonomy."<sup>32</sup> We must finally come to terms with the essential difficulties of the defense—why the law partially excuses some, but not all, emotional defendants and defines some, but not all, passions as rational. In Part I, I present my empirical findings, focusing on the role of departure in the practice of the provocation defense. In Part II, I consider the conventional arguments for the defense, finding that each leaves us with the same question: Why are some emotions worthy of protection (jealous rages), while others are not (till-inspired greed)?<sup>33</sup> In this Part, I try to show how a defense committed to the idea that it protects the "choosing self" turns out to protect something quite different.

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of marital unity into a modern one of emotional unity. Cf. 1 WILLIAM BLACKSTONE, COMMENTARIES \*430 ("[T]he very being or legal existence of the woman is suspended during the marriage . . .").

28. The "reward" granted here to men for a trait typically deemed "feminine" (emotion) is a double-edged sword because it carries with it the associated judgment that the man lacks moral agency. See Anne Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 26–43 (1994) (explaining long tradition in criminal law in which married women were deemed to lack moral agency).

29. See WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* (1995).

30. I do not mean to diminish the effect of these rules upon women. I think it important, however, to remember that stereotypes take "two" to create and this can have important, and damaging, spillover effects on men as well. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 9 (1995); Mary Anne Case, *Of Richard Epstein and Other Radical Feminists*, 18 HARV. J.L. & PUB. POL'Y 369, 370–71 (1995) ("[F]eminism is not simply about women. Feminism is about the sexes—there are two of them.") [hereinafter Case, *Of Richard Epstein*].

31. I argue below that the law needs to increase its protection of emotion in some circumstances. See *infra* notes 417–19 and accompanying text.

32. I do not seek to celebrate the end of intimacy or endorse a heartless independence. I do not believe in an "ethics of autonomy," the claim that our morals depend on human beings who can be described "without relationships." See THOMAS L. SHAFFER & MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES* 20–21 (1991) (rejecting this position). Relationships are relevant to our identities. See, e.g., Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thought and Possibilities*, 1 YALE J.L. & FEMINISM 7, 35–36 (1989) (arguing that respect for autonomy must also recognize role of social relationships in constituting individual). As I argue later, the law of provocation itself constructs and depends upon a particular idea of loyalty within relationships. See *infra* text accompanying notes 277–305. The ultimate question here is not whether we should replace loyalty with autonomy. The question is whether the law imposes, rather than reflects, a preexisting ideal of loyalty, an ideal that is based on an image of gendered relationships long ago abandoned.

33. See H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 33 (1968) (relying on "common sense generalizations" about "human nature" for conclusion that men are "capable of self-control when confronted with an open till but not when confronted with a wife in adultery").

In the face of repeated efforts to banish normative decisionmaking from the defense, liberal theorists have actually helped to entrench norms about relationships.<sup>34</sup> The intellectual move here is one I call the "personification" of the defense, a move that places all of the normative questions into the form of questions about the qualities and attributes of persons<sup>35</sup> and thus disguises both the essential normativity of the inquiry<sup>36</sup> and the fact that the Model Penal Code's concealed normative commitments are to relationships rather than persons.<sup>37</sup> In Part III, I explain that move and investigate the theoretical underpinnings of reform's approach, arguing that provocation's defenders and its critics are doomed to talk past each other. As long as reform's defenders start from the position that the freedom of individuals is measured in their distance from relationships, they will find little common ground with those who maintain that law must consider our relationships to each other.

Finally, in Part IV, I present a new, more limited, version of the defense that seeks to honor equality as well as autonomy. The passion defense should be retained as a partial excuse but only in the limited set of cases in which the defendant and the victim stand on an equal emotional and normative plane. When a man kills his wife's rapist, his emotional judgments<sup>38</sup> are inspired by

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34. Even the best-intentioned efforts at reform may, in the end, simply entrench status regimes. For an extraordinarily insightful examination of the way in which challenges to status regimes sustain as they transform, see Reva B. Siegel, *"The Rule of Love": Wife Beating As Prerogative and Privacy*, 105 YALE L.J. 2117 (1996). See also *infra* Part III (noting that by "naturalizing" status relations within minds and hearts of "reasonable men," reform actually entrenched norms about relationship).

35. See 2 CHARLES TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS* 15–32 (1985) (discussing this intellectual habit in social sciences generally). Lest there be any confusion at the start, my thesis does not depend upon communitarian notions of the self or the communitarian's attempt to place relationships of loyalty prior to the self. On the other hand, I do not seek to celebrate the victim's autonomy interest as prior to the defendant's. I am asking whether the defendant's claim is really one of autonomy (the right to "choose") or a claim that the defendant is entitled to impose his particular normative view of relationships upon others (the right to "legislate").

36. My understanding of normativity is that it is inherently "relational." Norms are not simply values, they are commitments we make to one another to act in particular ways in the future. If this is correct, an intellectual method that places all of the normative issues within individuals will, from the start, make norms in the image of the individual. I believe that this method, although quite common in the law, is essentially hostile toward candid thinking about our normative commitments. It also makes for obvious conflicts between liberals and feminists. See *infra* Part III.

37. My diagnosis of the defense's failures as well as my argument for its reconstruction apply to most jurisdictions, not simply those adopting the MPC. The MPC practice is the logical, and most extreme, example of intellectual habits found in many other jurisdictions that have focused on the emotions of "reasonable persons."

38. Lest the idea of an "emotional judgment" seem outlandish from the start, I argue in Part IV that this position is far more consistent with modern ideas of psychology—and even brain science—than the position that emotions are purely behavioral. Nor is it particularly new; one can trace the idea of emotion as essential to moral rationality to philosophers as ancient as Aristotle and Hume. See Annette C. Baier, *Hume, the Women's Moral Theorist?*, in *WOMEN AND MORAL THEORY* 37 (Eva Feder Kittay & Diana T. Meyers eds., 1987) (discussing Hume's ideas of "sympathetic" correspondence between persons essential to moral judgments); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 290–91 (1996) (discussing earlier Aristotelian ideal of emotion as reflection of judgment).

a belief in a “wrong” that is no different from the law’s own: *Ex ante*, there is no doubt that rape is wrong both for the defendant and the victim and that the defendant’s “outrage” is “understandable” from this perspective. When a man kills his departing wife, claiming that her departure outraged him, this normative equality disappears. There is no reason to suspect that the victim would have agreed to a regime in which “leaving” was a wrong that the law would punish.<sup>39</sup> To embrace the defendant’s emotional judgments in these latter circumstances not only allows the defendant to serve as judge and executioner, but also as legislator. It allows the defendant to stand above the victim and enforce at penalty of death a set of emotional judgments that are, at best, partial.

My proposal for a “warranted excuse”<sup>40</sup> is likely to be controversial from a variety of perspectives: It declines to recommend abolition as some feminists have urged, rejects the traditional idea of emotion upon which current theories of self-control depend,<sup>41</sup> and calls for a merger of excuse and justification that may appear oxymoronic to some.<sup>42</sup> Moreover, it would change the practice of the defense substantially, barring manslaughter verdicts in most intimate homicide cases. The old scholarly questions may remain, but I offer my own view as a beginning to a new debate. We punish those who stand in emotional judgment not because of their character or their self-control, but because they have replaced the state as the normative arbiter of violence, and when we partially excuse, we excuse not because reasonable men kill but because the law sees reason in the defendant’s emotion, reason that mirrors the law’s own sense of retribution. In short, we partially excuse when coherence demands it, when the defendant appeals to the very emotions to which the state appeals to rationalize its own use of violence.

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39. As I argue later, judgments of “wrongfulness” include both intellectual and emotional components. See *infra* Part IV.

40. Scholarly consideration of the provocation defense has focused a good deal of energy on the question of whether the defense is an excuse or a justification. See, e.g., A.J. Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292, 292–97 (1976); Dressler, *Provocation*, *supra* note 24, at 480 (arguing that courts have been “insufficiently concerned about the justification-excuse distinctions” in provocation). I argue in Part IV that the defense remains a partial excuse, but one that requires us to evaluate critically the relationship between the defendant’s claims of emotion, and the claims’ implicit normative judgments, to other norms the law expresses. I call this a “warranted excuse.” See *infra* Part IV.

41. In this, my view is similar to that recently proposed by Dan Kahan and Martha Nussbaum, although I disagree with their proposed solution to the problem. It is necessary, but not sufficient, in my view, to replace a descriptive theory of emotion with an evaluative one. See *infra* Part IV; cf. Kahan & Nussbaum, *supra* note 38, at 364–65 (advocating evaluative understanding of emotion).

42. Traditionally, it is thought that excuses and justifications are mutually exclusive—that if action is warranted (and therefore justified), it cannot be excused because, by definition, conduct that needs to be excused is unwarranted. See Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 438 (1982). This understanding, however, assumes that the proper focus of the inquiry is on the “act” itself; my claim is built upon the idea that we are evaluating the defendant’s emotional claims, not his acts. In this world, it is perfectly consistent to say that the act is unjustified overall and, at the same time, that the emotion may be “warranted.” See *infra* Part IV.

## I. PASSION, PROVOCATION, AND REAL LIFE

### A. Legal Background

During the O.J. Simpson trial, Susan Estrich suggested in an editorial in *USA Today* that legislatures should abolish the heat of passion defense.<sup>43</sup> In this, she echoed Jeremy Horder's earlier call that the defense "ought to be abolished" because it imposes significant disadvantages on women.<sup>44</sup> These calls are but the culmination of a growing legal controversy about the provocation defense—a legal controversy that has focused not only on results (i.e., who gets the defense, who does not), but more importantly on what the law would have us call "passion."

Modern theories of provocation assume that passion knows no specific circumstances, but may arise in any situation. We partially excuse defendants who kill in passion because they lacked self-control. In this focus on self-control, the modern theory seeks to distinguish itself from earlier approaches limiting the defense to cases in which the "passion" depended upon the victim's wrong, in which the law assumed the victim partially deserved her fate. The modern view is roughly associated with reform of the defense, which envisions provocation as a partial excuse; the earlier view is roughly associated with the common law and regards provocation as partial justification.<sup>45</sup> Although most jurisdictions today appear to borrow from both of these models, the trend over the past century has been decidedly toward a model based on excuse and a theory based on self-control.<sup>46</sup>

The Model Penal Code (MPC) represents the height of the liberal reform movement<sup>47</sup> and the culmination of the law's move away from categorical rules.<sup>48</sup> Inspired by the theory that the provocation defense exists to protect free choice, the MPC drafters created a defense remarkably sensitive to context

43. See Susan Estrich, *Don't Be Surprised If O.J. Gets Off Easy*, USA TODAY, June 23, 1994, at 1A.

44. See JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 186–87 (1992) (presenting data from English practice to support claim of abolition based on disparate impact on women). Both Horder and Estrich rely upon a disparate impact argument, Estrich apparently relying upon sentencing data in California, Horder on data from Britain as a whole. See *id.* at 187–88; Estrich, *supra* note 43; see also Dressler, *Reflections*, *supra* note 24, at 735–37 (suggesting, albeit rejecting, argument that abolition is plausible utilitarian position because of gender bias). My argument is not based on statistical impact nor on utilitarian premises.

45. The classic statement of this controversy appears in Dressler, *Provocation*, *supra* note 24, at 467–72.

46. See *id.* at 467 ("[T]he trend in England and the United States of America is to treat the defense as an excuse, focusing less on the decedent's wrongful conduct and more on the accused's lack of self-control.").

47. The MPC aspired to be an "ideal penal code." See Herbert Wechsler, *A Thoughtful Code of Substantive Law*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 524, 525 (1954–55), quoted in Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1427 (1968).

48. See Dressler, *Reflections*, *supra* note 24, at 733 ("The rigid common law categories of 'adequate provocation' have largely given way to the view that the issue is one for the jury to decide.").

and the defendant's peculiar perspective. They rejected a "reasonable man" standard as too objective, precluding "any attention to the special situation of the actor."<sup>49</sup> Even something as basic as the idea of a "sudden passion" found little support in the MPC's draft. Refusing to limit the defense to instantaneous explosions of violence, drafters embraced a rule that allowed the defendant's "passion" to arise slowly, "simmering," as one court put it, "in the unknowing subconscious."<sup>50</sup> By the beginning of the 1980s, a "substantial minority of jurisdictions"<sup>51</sup> had adopted the Model Code's formulation in whole or in part.<sup>52</sup> Although some states balked at the Code's psychological emphasis, the Code's reformist influence was widely praised.<sup>53</sup> Even as many legislatures refused to adopt the MPC's draft, courts and scholars borrowed the Code's commentary to support various reforms.<sup>54</sup> In the end, Herbert Wechsler's MPC commentary helped to solidify and legitimize a theory of the defense based on self-control that was far more influential than the draft itself.<sup>55</sup>

Precisely because of the enormous influence of Wechsler's work, some find it difficult to imagine that the provocation defense could be based on anything other than self-control. As a historical matter, however, this is clearly untrue. In early modern law, passion was defined by a set of categories derived

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49. The drafters articulated their intent this way:

[T]hat the provocative circumstance must be sufficient to deprive a reasonable or an ordinary man of self-control, leaves much to be desired since it totally excludes any attention to the special situation of the actor. . . . [F]ormulation in the draft affords sufficient flexibility to differentiate between those special factors in the actor's situation which should be deemed material . . . and those which properly should be ignored.

MODEL PENAL CODE § 201.3 commentary at 47-48 (Tentative Draft 1959) [hereinafter Tentative Draft].

50. *People v. Patterson*, 347 N.E.2d 898, 908 (N.Y. 1976), *aff'd*, *Patterson v. New York*, 432 U.S. 197 (1977).

51. LAFAVE & SCOTT, *supra* note 14, at 660.

52. Today, eleven states and two territories have adopted, in whole or in part, the MPC "extreme emotional distress" formulation. For a list of the states and the relevant statutes, see *infra* note 88. For a comprehensive analysis of the particular nuances and differing formulations of these statutes, see PAUL H. ROBINSON, 1 CRIMINAL LAW DEFENSES § 102(a) (1984 & Supp. 1997).

53. Academic commentary during the 1970s and 1980s almost uniformly praised the MPC's "subjectification" of the defense. See, e.g., Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435, 449-50, 462 (1981) (arguing for elimination of "reasonable excuse or explanation" limitation); Richard Singer, *The Resurgence of Mens Rea: I—Provocation, Emotional Disturbance, and the Model Penal Code*, 27 B.C. L. REV. 243, 317-22 (1986) (discussing legal commentary).

54. See, e.g., *People v. Pouncey*, 471 N.W.2d 346, 350 (Mich. 1991) (refusing to adopt common law's "mere words" rule based on theory, found quite clearly in MPC commentary, that there are some "emotions so intense that they distort the very process of choosing") (citation omitted); *State v. Crisantos*, 508 A.2d 167, 170 n.2, 172 (N.J. 1986) (noting that New Jersey rejected EED formula but relying upon MPC commentary for approach that is flexible and nonformulaic); *Commonwealth v. McCusker*, 292 A.2d 286, 290 (Pa. 1972) (adopting "slow burn" rule in non-MPC jurisdiction similar to rule advocated in MPC commentary).

55. Although the MPC's provocation formula did not prompt mass legislative conversion, its impact within the academic community has far outstripped its legislative reality. Indeed, if casebooks are any measure, the MPC's EED approach is taught in every criminal law classroom in America. See, e.g., GEORGE E. DIX & M. MICHAEL SHARLOT, CRIMINAL LAW: CASES AND MATERIALS 430-42 (4th ed. 1996); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 416-37 (6th ed. 1995); JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 443-44, 447-49 (3d ed. 1996); LOW ET AL., *supra* note 1, at 896-903; ROBINSON, *supra* note 25, at 612-19.

from an older social order, indeed, a code of honor.<sup>56</sup> The "nineteenth century four"<sup>57</sup>—adultery, mutual combat, false arrest, and a violent assault—defined the outer reaches of adequate provocation,<sup>58</sup> just as "mere words" and "trivial" provocation defined what was clearly inadequate provocation.<sup>59</sup> These categories were thought to isolate those cases in which the violation of a social or relational norm led to righteous anger.<sup>60</sup> Adultery was at the center of the categories,<sup>61</sup> the classic source of adequate provocation,<sup>62</sup> enforcing rules of gender relations grounded in an older idea of property.<sup>63</sup>

Today in the United States, the law of provocation stands at a crossroads. No theory has ever convinced a majority of scholars,<sup>64</sup> and recently there have been substantial cries that the law reflects a biased order.<sup>65</sup> The doctrine is in extraordinary disarray: Indeed, a case classified as manslaughter in one jurisdiction is just as easily defined as murder in another, even though the resulting penalties may differ substantially.<sup>66</sup> Although most jurisdictions have

56. See HORDER, *supra* note 44, at ch. 2.

57. See Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 80 (1992) (citing Note, *Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man*, 106 U. PA. L. REV. 1021, 1023–24 (1958), on "nineteenth century four").

58. See KADISH & SCHULHOFER, *supra* note 55, at 413 ("[T]he long-standing common law rule . . . permits the jury to find adequate provocation only in a few narrowly defined circumstances."). For a comprehensive understanding of the categories and limiting rules, see HORDER, *supra* note 44, at ch. 2; Ashworth, *supra* note 40, at 293.

59. See HORDER, *supra* note 44, at 97–99.

60. See *id.*

61. Thus, a defendant who killed in response to adultery (a breach of a property relation between husband and wife at common law) was entitled to claim the defense, while a defendant who observed the infidelity of his fiancée, to whom there was no legal relationship, was not entitled to the defense. See Dressler, *Provocation*, *supra* note 24, at 474. From the perspective of "self-control," of course, this distinction makes little sense.

62. See Coker, *supra* note 57, at 72 ("[S]cholars repeatedly refer to adultery as the paradigm example of provocation . . .").

63. The story of adultery's grounding in older property norms has been told elsewhere and need not be repeated here. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 221–22 (1993) (discussing "unwritten" law that found "justifiable" killing of unfaithful wives' lovers); see also KAPLAN ET AL., *supra* note 55, at 427–31; Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1694–95 (1986).

64. See Dressler, *Provocation*, *supra* note 24, at 480 ("Confusion surrounds the provocation defense."); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 636 (1981) ("[T]here exists no convincing interpretation of reasonable provocation."); Glanville Williams, *Provocation and the Reasonable Man*, 1954 CRIM. L. REV. 740, 741–42 (raising fundamental questions about theory of provocation).

65. See Coker, *supra* note 57, at 78 (arguing that provocation defense protects batterers); Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 135–36 (1992) (arguing that provocation defense is homophobic); Taylor, *supra* note 63, at 1689–92 (arguing that provocation defense applies male standard of reasonableness).

66. The offense of "manslaughter" is specifically defined by the MPC as something "other than" and "lesser than" murder. See MODEL PENAL CODE § 210.3 (1985) (manslaughter); *id.* § 210.2 (murder). The Code's commentaries and its penalties support that view: While a murder verdict may yield a sentence of life imprisonment, the maximum Code penalty for manslaughter is 10 years. See *id.* § 210.3; see also DEL. CODE ANN. tit. 11, §§ 632, 4205 (1995) (10-year maximum); HAW. REV. STAT. §§ 707-702, 706-660 (1988) (same). Actual time served for most manslaughter offenses appears to have remained steady at approximately five to eight years. See CRAIG PERKINS, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE



adopted what appears to be a similar “reasonable man” standard, that standard has been applied in dramatically different ways, with jurisdictions borrowing from both liberal and traditional theories. Some states require a “sudden” passion, others allow emotion to build up over time;<sup>67</sup> some reject claims based on “mere words,” others embrace them.<sup>68</sup> Today, we are only safe in saying that in the law of passion, there lie two poles—one exemplified by the most liberal MPC reforms and the other by the most traditional categorical view of the common law. In between these poles, a majority of states borrow liberally from both traditions.

Given this state of affairs in doctrine and theory, it is appropriate that we turn to the law of passion in practice. In what follows, I offer a summary of my research. I first explain the methodology of my survey, a more complete version of which appears in Appendix A. After taking a closer look at the results, I ask how “reform” cases differ from “traditional” approaches and whether these results diverge substantially from results in “mixed” jurisdictions. At the outset, let me say that I recognize the arguments for the reform approach, arguments I address at length in Part II. Here, I present a picture of reform’s practice rather than its theory.

## B. *Summary of Research and Methodology*

*By February 1982, “Karen left the defendant and moved into the . . . home of her brother . . . . She returned to the defendant for about six days but left for the final time when he threatened to kill her if she or her brother tried to contact the police.”<sup>69</sup> He did not seek to contact her for about three months. After the defendant made “several telephone calls . . . to speak to his wife,” calls which prompted Karen’s brother to “file[] a complaint . . . with the state police,” Karen instituted divorce proceedings and her parents complained to the state police.<sup>70</sup> The defendant then drove to Karen’s new home, disconnected the telephone wires, and shot Karen’s father.<sup>71</sup> The jury was*

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PROGRAMS, U.S. DEP’T OF JUSTICE, NATIONAL CORRECTIONS REPORTING PROGRAM, 1992, at 46 tbl.2-12 (1994) (reporting 61 months mean time served based on mean sentence of 136 months for nonnegligent manslaughter); *see also* PATRICK A. LANGAN & JOHN M. DAWSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SPOUSE MURDER DEFENDANTS IN LARGE URBAN COUNTIES at iv (Sept. 1995) (showing average time served of six to eight years in spousal murder cases yielding nonnegligent manslaughter disposition). However, legislatively prescribed maximums for manslaughter sentences have been gradually rising in MPC and other states. *See, e.g.*, KY. REV. STAT. ANN. §§ 507.030, 532.060 (Banks-Baldwin 1994) (20-year maximum); OR. REV. STAT. §§ 163.118, 161.605 (1995) (20-year maximum).

67. *Compare* Commonwealth v. McCusker, 292 A.2d 286 (Pa. 1972) (adopting cumulative provocation rule), *with* State v. Gadson, 442 S.E.2d 594 (S.C. 1994) (holding that passage of time negates heat of passion).

68. *Compare* People v. Pouncey, 471 N.W.2d 346 (Mich. 1991) (refusing to adopt rule that words may never be adequate provocation), *with* Metheney v. State, 538 N.E.2d 1202 (Ind. 1992) (“[M]ere words alone cannot constitute sufficient provocation.”).

69. State v. Utz, 513 A.2d 1191, 1192 (Conn. 1986).

70. *See id.*

71. *See id.* at 1192–93.

*instructed that it could return a manslaughter verdict based on "extreme emotional disturbance."*<sup>72</sup>

*"Defendant was very upset that his wife had filed for dissolution. She was living with her mother and had obtained a temporary restraining order preventing him from entering her residence. After she filed the dissolution action, defendant told a number of people that he wanted to kill her."*<sup>73</sup> *The defendant called his wife, who refused to talk to him and hung up. "He returned to work and, from there, called a friend and said that he wanted to go kill his wife. Defendant left work about 9:00 p.m. and went to his wife's residence. He kicked the door in, went in and said, 'this is it.'"*<sup>74</sup> *The jury was instructed that it could return a verdict of manslaughter based on "extreme emotional disturbance."*<sup>75</sup>

*"Smith grew despondent over news that his girlfriend was leaving him. Becky Church, the 17-year-old mother of the infant Amanda, had decided to . . . move to Ohio to live with her mother."*<sup>76</sup> *Within ten days, "Smith arrived at the home of Becky's family. After a brief argument with Becky, Smith retrieved his 30/30 hunting rifle from the hedge where he had hidden it."*<sup>77</sup> *He shot through the door, killing Becky's half-sister, then went into the house and killed Becky's mother. Some time later, as the ambulance attendants administered to the victims, Smith killed Becky and the daughter she was holding in her arms."*<sup>78</sup> *The jury was instructed that it could return a manslaughter verdict based on "extreme emotional disturbance."*<sup>79</sup>

Contemporary life, gender, and culture tell us that cases of intimate homicide are the stuff of love triangles and sordid affairs. But look again at the cases summarized above—there is no infidelity, no rival, no affair, no triangle. They tell a different story, a story of separation and departure. My research suggests that separation is neither an idiosyncratic nor an isolated phenomenon in intimate homicide cases raising the provocation defense. Indeed, in the reform jurisdictions that I studied, my data reveals that one is as likely, if not more likely, to find a relationship that has ended, was ending, or in which the victim sought to leave, as one is to find an affair or sexual infidelity alone.<sup>80</sup>

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72. *See id.* at 1194.

73. *State v. Wille*, 858 P.2d 128, 130 (Or. 1993).

74. *Id.*

75. *See id.* at 130–31 ("The trial court advised the jury that the EED defense could reduce the crime of intentional murder to manslaughter, [but was not a defense to felony murder].").

76. *Smith v. Commonwealth*, 734 S.W.2d 437, 440 (Ky. 1987).

77. *Id.*

78. *See id.*

79. *See id.* at 449.

80. This conclusion holds true for MPC states and the "mixed" jurisdictions that I studied. Sixty-five percent of all MPC claims (86/133) in my data set involved a "separated couple" as compared to 47% of

These findings suggest quite strongly that the conventional image of passionate homicide—sexual betrayal, love triangles, sordid affairs—represents a flawed view. We might have been forewarned that the picture was more complex. In a groundbreaking article written in 1991, Martha Mahoney argued that many cases we see as “domestic violence” amount, in fact, to what she termed “separation assaults,”<sup>81</sup> attacks committed in response to a woman’s attempt to leave a relationship. In the homicide context, recent empirical research tends to corroborate Mahoney’s theoretical insights: Studies suggest that between forty-five and fifty-six percent of all intimate homicides men commit<sup>82</sup> involve some element of separation.<sup>83</sup> In the most comprehensive

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claims (63/133) involving infidelity. *See supra* note 454 (defining “separated couple”). Seventy percent (37/53) of all claims in “mixed” jurisdictions involved a “separated couple” as compared to 47% (25/53) involving infidelity. This also holds true for claims that reached juries. *See infra* Table A (reporting that in MPC states 67% (66/99) of claims reaching juries involved element of separation as compared to 54% (53/99) that involved infidelity); *see id.* (reporting in mixed jurisdictions that 66% (23/35) of claims reaching juries involved separation as compared to 49% (17/35) involving infidelity). *But cf. id.* (reporting that in traditional jurisdictions, separation appears in only 39% (15/38) of cases reaching juries as compared to infidelity, which was involved in 45% (17/38) of cases). Often, of course, these factors go hand in hand: One sees claims that an ex-spouse or ex-partner had begun a new sexual relationship that inspired the violence. That these cases involve “infidelity” does not diminish the fact that they also involve separation.

81. *See Mahoney, supra* note 4, at 71–79.

82. It is important not to confuse the sex ratio of homicides involving separated couples with the sex ratio in homicide generally or intimate homicide itself. Relative to *all* homicides, females are more than nine times as likely to be killed by a husband, ex-husband, or boyfriend as are men to be killed by a wife, ex-wife, or girlfriend. *See* RONET BACHMAN & LINDA E. SALTZMAN, U.S. DEP’T OF JUSTICE, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 4 (1995) (reporting that 28% of female homicide victims versus 3% of male victims were killed by opposite-sex partners). Within the universe of *intimate* homicide, however, the precise sex distribution of perpetrators is a subject of some controversy. In Anglo-Saxon countries generally, men are far more likely to kill their married female partners than the reverse (in Canada, the ratio is 3 to 1; in England, the ratio is 4 to 1; in Scotland, the ratio is 2.5 to 1). Data for the United States is based on studies of selected cities showing rates as low as 1 to 1. *See* Margo I. Wilson & Martin Daly, *Who Kills Whom in Spouse Killings?: On the Exceptional Sex Ratio of Spousal Homicides in the United States*, 30 CRIMINOLOGY 189, 191 tbl.1 (1992); *see also* Franklin Zimring et al., *Intimate Violence: A Study of Intersexual Homicide in Chicago*, 50 U. CHI. L. REV. 910, 914 (1983) (reporting that “the war between the sexes takes its casualties in almost equal measure [in Chicago in 1981]”). This discrepancy may reflect the peculiar demographics of urban-based studies; in any event, such comparisons should not be read to imply symmetry in the circumstances of the killings. Existing studies tend to suggest, for example, that women often kill in self-defense, a factor that might well exclude them from cases in which provocation is claimed. *See* LANGAN & DAWSON, *supra* note 66, at iv (noting that in 44% of cases studied in which wives kill husbands, killing occurred at or about time of physical assault upon wife by husband as opposed to 10% of husband defendants); *see also* Angela Browne & Kirk R. Williams, *Exploring the Effect of Resource Availability and the Likelihood of Female-Perpetrated Homicides*, 23 L. & SOC’Y REV. 75, 76 (1989) (finding that homicides by women are more likely to be in response to male violence than male-perpetrated homicides are to be in response to female violence); Wilson & Daly, *supra*, at 206 (emphasizing that men “often hunt down and kill spouses who have left them [and] . . . kill in response to revelations of wifely infidelity; women almost never respond similarly . . . . Men often kill wives after subjecting them to lengthy periods of coercive abuse and assaults; the roles in such cases are seldom if ever reversed.”).

83. *See* George W. Barnard et al., *Till Death Do Us Part: A Study of Spouse Murder*, 10 BULL. AM. ACAD. PSYCHIATRY & L. 271, 274 tbl.2 (1982) (finding that 56.5% of wife killers studied were estranged from their wives as opposed to 9.1% of husband killers); Jacquelyn C. Campbell, “If I Can’t Have You, No One Can”: *Power and Control in Homicide of Female Partners*, in FEMICIDE 99, 106–07 (Jill Radford & Diana E.H. Russell eds., 1992) (reporting study of Dayton, Ohio murder police files showing that of 33 intimate murders by former or present husbands, boyfriends, or casual lovers, 48% involved separation (5 former casual sex partners plus 11 estranged husbands or boyfriends)); Barbara Hart, *Gentle Jeopardy: The*

study to date, Martin Daly and Margo Wilson have concluded that "wives are much more likely to be slain by their husbands when separated from them than when coresiding."<sup>84</sup> If they are correct, it is unsurprising to find a high percentage of claims (sixty-five percent)<sup>85</sup> in my research in which the relationship was over, ending, or in which the victim sought to leave.

If separation is a fact of intimate homicide, it is a fact likely to surprise lawyers. The law's vision of a crime of passion, a view reflected in treatises, casebooks, and scholarly work, focuses on sexual infidelity, not departure. This, of course, raises several questions of interest: If intimate homicide frequently involves separated couples why does our canonical legal image still revolve around sexual infidelity? Is separation simply irrelevant to legal practice? Or, if it is relevant, how is it relevant? Has reform, in rejecting adultery as a legal category, embraced or rejected separation?

To answer these questions, I sought to study intimate homicide cases in three types of jurisdictions: MPC, traditional, and mixed. The MPC data set was developed by collecting all<sup>86</sup> intimate homicide cases reported from 1980 to 1995 in which a provocation claim was asserted in the context of an adult intimate relationship<sup>87</sup> in the eleven states and two territories adopting the Code's formulation in whole or in part.<sup>88</sup> Many provocation cases (e.g.,

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*Further Endangerment of Battered Women and Children in Custody Mediation*, 7 *MEDIATION Q.* 317, 324 (1990) ("Almost a quarter of the women killed by their male partners in one study in Philadelphia and Chicago were separated or divorced from the men who killed them; 28.6 percent of the women were attempting to end the relationship when they were killed.") (citation omitted); Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 *VIOLENCE & VICTIMS* 3, 4 (1993) (reporting Australian study finding that 45% of women slain by husbands "had left their killers or were in the process of leaving").

84. Wilson & Daly, *supra* note 83, at 8. Each country studied (Canada, Australia, the United States (Chicago)) showed a significant increased homicide risk to women who were estranged from their husbands or boyfriends. *See id.* at 7 tbl.1 (reporting ratio of female to male victims in coresiding versus estranged couples as 3.77 to 9 in Canada, 2.91 to 15.33 in Australia, and 1.02 to 2.25 in Chicago). Because the idea that "separation" may increase the risk of violence is controversial for some, *see, e.g.*, ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE* 34-35 (1994), it is worth noting that Wilson and Daly are evolutionary psychologists, not radical feminists. On the relationship between sociobiology, libertarianism, and feminism with reference to Wilson and Daly's work, *see Case, Of Richard Epstein, supra* note 30, at 395-97. *See also* David M. Buss, *Evolution and Human Mating*, 18 *HARV. J.L. & PUB. POL'Y* 537, 538-40 (1995) (discussing evolutionary psychology and male violence).

85. This number (86/133) is based on my estimate of "separated couples" in the MPC data set (all claims in which the parties are estranged, living apart, divorced, or separated at the time of the killing or in which we know that the provoking party sought to leave). *See* Appendix A; Table F. Table F shows that 67% (82/122) of male defendant claims as opposed to 36% (4/11) of female defendant claims involved a couple that was "separated" in this sense. These figures (1.9 to 1) are close to the lower end ratios, shown by other social science research, of male versus female killings in estranged situations. *See* Wilson & Daly, *supra* note 83, at 7. Note that the number of "separated couples" is actually larger than the number of "separation" claims because some separated defendants' provocation claims may not be based on "separation" in whole or in part. *See supra* note 454.

86. It is possible, of course, that my data set misses relevant cases. If so, this should not impugn the integrity of my research as long as my methodology proceeds without bias. *See* Appendix A.

87. An "adult intimate relationship" is defined to include opposite sex as well as same-sex relationships. For more on this definition, *see* Appendix A.

88. Today, eleven states and two territories have adopted, in whole or in part, the MPC "extreme emotional distress" formulation: Arkansas, ARK. CODE ANN. § 5-10-104(a)(1) (Michie 1993); Connecticut, CONN. GEN. STAT. ANN. §§ 53a-54a(a) (West 1994); Delaware, DEL. CODE ANN. tit. 11, §§ 632(3), 641

barroom brawls) do not involve intimate partners. To obtain the broadest possible coverage, I began by using a computer search designed to find *all* cases in which a provocation or “extreme emotional disturbance” (EED) claim was raised, whether or not the parties were related to each other. Each case returned was then individually reviewed to determine whether there was an intimate relationship between the “provoking party”<sup>89</sup> and the defendant. This data set was then compared to samples drawn from selected “traditional” and “mixed” jurisdictions.<sup>90</sup> I defined “traditional” jurisdictions<sup>91</sup> as those that use the common law’s categories both for including claims (e.g., adultery) and for excluding claims (e.g., claims based on “words alone”).<sup>92</sup> I defined “mixed” jurisdictions as those in which the courts still accepted some traditional rules but had liberalized the defense by rejecting the categories and favoring a more subjective approach toward the defendant’s claims.<sup>93</sup>

For each jurisdiction, the aim was to determine whether the law would permit juries to return manslaughter verdicts under common factual scenarios. Cases were coded based on four scenarios: *separation*, *infidelity*, *physical violence*, and *other*. These factors were often found alone but could also be

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(1995); Hawaii, HAW. REV. STAT. ANN. § 707-702(2) (Michie 1995); Kentucky, KY. REV. STAT. ANN. §§ 507.020(1)(a), 507.030(1)(b) (Michie 1985); Montana, MONT. CODE ANN. § 45-5-103(1) (1995); New Hampshire, N.H. REV. STAT. ANN. § 630:2 (1996); New York, N.Y. PENAL LAW §§ 125.20(2), 125.25(1)(a), 125.27(2)(a) (McKinney 1996); North Dakota, N.D. CENT. CODE § 12.1-16-01(2) (1985); Oregon, OR. REV. STAT. §§ 163.115(1)(a), 163.118(1)(b), 163.135 (1995); Utah, UTAH CODE ANN. § 76-5-205(1)(b) (1995); American Samoa, AM. SAMOA CODE ANN. § 46.3504(a)(2) (1987); and Guam, 9 GUAM CODE ANN. § 16.50(a)(2) (1992). Two of the states—New Hampshire and Utah—have adopted only part of the MPC formulation but are included here to provide the broadest possible coverage. See Singer, *supra* note 53, at 292–94. The District of Columbia has considered the adoption of the MPC approach by judicial interpretation but has not reached a final decision. See *Simpson v. United States*, 632 A.2d 374, 377 (D.C. 1993) (discussing dispute about recognition of EED defense). For an analysis of the particular nuances and differing formulations of these statutes, see ROBINSON, *supra* note 52, § 102(a), at 481 n.9; *id.* Supp. at 75.

89. The “provoking party” is typically the victim, but not always. Imagine a defendant who finds out that his wife is having an affair and who kills a bystander. The “provoking party” is the wife; the victim is the bystander.

90. For the method by which these jurisdictions were chosen, see Appendix A.

91. The “traditional” state sample is derived from all cases reporting that a provocation claim was made in an intimate homicide case from 1980–95 in the states of Illinois and Alabama. Most states have moved away from the “categories” and associated limiting rules, but Alabama and Illinois are not alone in retaining some or all of them. For a discussion of the factors that led to the choice of Illinois and Alabama, see *id.*

92. For a description of the common law rules limiting provocation claims, see *supra* text accompanying notes 57–60.

93. The “mixed” state sample is derived from all cases reporting a provocation claim in an intimate homicide case from 1980–95 in the states of California and Minnesota. “Mixed” states tend to be the norm in the United States. Because these states often follow different mixtures of doctrinal rules, however, it is difficult to compare practices across jurisdictions. For example, if a jurisdiction retains the “words alone” rule but in all other respects looks like a “reform” jurisdiction, one’s results would be skewed based on that one particular rule. I have chosen California and Minnesota because their mixture of rules appears similar and representative of moderate reform—some subjectification of the defense but retention of rules such as the “third party” rule (barring use of the defense when the defendant kills someone other than the provoking party). I hope, in further work, to be able to provide a comprehensive survey of the law of traditional and mixed jurisdictions. In this work, however, because my purpose is to identify the changes wrought by legal reform, I have limited my survey to selected jurisdictions. For a discussion of the factors that led to the choices of Minnesota and California, see Appendix A.

present in the same case (separation and infidelity were a common combination, for example). *Separation* cases were those reporting that the defendant and the provoking party had separated, in fact or in law, or in which there was evidence that the provoking party sought to leave.<sup>94</sup> *Infidelity* cases were those reporting or suggesting that the defendant's claim rested upon unfaithfulness, defined broadly to encompass every act from intercourse to dating or walking down the street with a romantic rival. *Physical violence* cases were those reporting or suggesting that the defendant relied upon some incident of physical violence prompting the emotional disturbance, whether that physical violence occurred immediately preceding the events or earlier in time. *Other* cases fit none of these categories; these were cases in which the claim rested on insults, hinged entirely on psychiatric diagnoses, or listed a variety of miscellaneous factors.<sup>95</sup>

For each of these factors, the case was assessed to determine whether, at trial, the jury could have returned a manslaughter verdict. Table A summarizes this comparative research. Note that separation figures frequently in cases that reach juries. Indeed, in at least two-thirds of the cases studied in MPC or "mixed" jurisdictions, juries were allowed to return a manslaughter verdict in cases involving a couple that had separated, were divorced, were estranged, or in which the victim sought to leave.

TABLE A. FACTUAL SCENARIOS IN CLAIMS REACHING JURIES<sup>96</sup>

ELEMENT	MPC (n=99)	TRADITIONAL (n=38)	MIXED (n=35)
Separation	67% (66/99)	39% (15/38)	66% (23/35)
Infidelity	54% (53/99)	45% (17/38)	49% (17/35)
Physical Violence	17% (17/99)	68% (26/38)	40% (14/35)
Other	7% (7/99)	3% (1/38)	6% (2/35)

94. This included reports that the parties had divorced, were separated, lived apart, or were estranged, as well as reports that the defendant had been ordered to avoid contact with the provoking party or where there was evidence that the provoking party sought to leave or rejected the relationship. For more on the definition of "separation," see *id.*

95. In a sense, these categories are quite artificial. Indeed, it is possible to describe many of these cases, including cases that involve "another" party, as claims based on attempts by the victim to separate from a relationship hindered by the defendant's efforts at control. For these reasons, I have deliberately avoided the terminology of "separation assault," see Mahoney, *supra* note 4, at 5-6 & *passim*, which covers a broader class of cases than the category of "separation" or "departure." I have chosen these categories to isolate the claimed effect of "infidelity" on the legal and rhetorical construction of these cases. For my definition of "separation," see Appendix A.

96. These figures were determined by summing every case in which "separation" or "infidelity" or "physical violence" appeared in the factual circumstances of the cases listed in Appendix B. They do not add up to 100% because some cases involve more than a single factor (e.g., separation and infidelity appear together quite frequently).

Of course, since many of the “separation” cases also involved infidelity or physical violence, I sought to refine the analysis by isolating cases involving no infidelity or physical violence.<sup>97</sup> I categorized the cases as follows: (1) *departure* claims, in which the defendant did not rely upon sexual infidelity or physical violence but in which there was evidence of a separation or rejection initiated by the provoking party; (2) *separation and infidelity* claims, in which the defendant did not rely upon physical violence but in which there was evidence of both separation and infidelity;<sup>98</sup> (3) *simple infidelity* claims, in which the defendant did not rely upon departure or physical violence, but in which there was evidence of sexual infidelity; (4) *physical violence* claims, in which the defendant may have relied on a variety of factors, including departure or infidelity, but in which there was evidence of physical violence by the provoking party;<sup>99</sup> and (5) *other* claims, in which the defendant did not rely upon physical violence or sexual infidelity or departure but, instead, on a claim that did not fit in the first four categories.<sup>100</sup> Table B reveals the results of this analysis, showing that over one-quarter of the MPC cases (twenty-six percent) reaching juries involved no infidelity or physical violence, but only departure.

My study turns on what happens at trial—whether juries are permitted to return manslaughter verdicts. The focus on jury instructions aims to provide a picture of trial practice that neither doctrinal analysis nor social science research has ever fully depicted. Recent Justice Department research tells us that most spousal murder cases yield a manslaughter, rather than a first or second degree murder, disposition.<sup>101</sup> But we do not know the legal bases for

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97. I chose to conduct the analysis in this way, rather than through a standard regression analysis, because I believe that, to most traditionally trained lawyers, a focus on the “exclusive” categories would be more easily accessible and ultimately more persuasive. I also believe that a more sophisticated statistical analysis might have suggested that my argument is based on a “disparate impact” theory. See *supra* note 44 (noting other scholars’ reliance on disparate impact theories). My argument uses the recurrence of “separation” and of “departure” in these cases to destabilize current understandings of a “passionate murder” long enough to make a normative argument. Without such data, I feared that my analysis could too easily be dismissed as anecdotal. My argument about why reform has failed or how the defense should be reconstructed could as easily be made with 10 cases as with 200. For the statistical validity of the separation and departure proportion, see Appendix A.

98. If there was any doubt about the “separation” aspect of the case, it was coded as “simple infidelity.” See, e.g., *Lovell v. Lopes*, 632 F. Supp. 306, 308 (D. Conn. 1986) (containing one line suggesting victim had moved to mother’s home, and classified as simple infidelity); *Estes v. Commonwealth*, No. 85-CA-1143-MR, available in LEXIS, States Library, Kycts file (Ky. Ct. App. May 20, 1986) (slip op.) (describing case in which victim is at mother’s home, suggesting departure, classified as simple infidelity).

99. For example, the presence of physical violence might be a sufficient reason to reach the jury, without regard to the influence of departure or infidelity. In the case of an overlap between “physical violence” and “other,” the case was categorized as “physical violence.”

100. For a more rigorous definition of these exclusive categories, see Appendix A.

101. This includes manslaughter dispositions obtained both by plea and jury verdict. See LANGAN & DAWSON, *supra* note 66, at iii (stating that while 70% of those “arrested . . . for spouse murder were charged with first degree murder, most persons convicted (52%) of spouse murder” were convicted of manslaughter or negligent manslaughter); *id.* at 6 (stating that 24% of spousal homicide defendants tried and convicted were convicted of voluntary manslaughter and 9% were convicted of negligent

TABLE B. PROVOCATION CLAIMS REACHING JURIES<sup>102</sup>

CATEGORY	ALL MPC (99/133) <sup>103</sup>	TRADITIONAL (38/81)	MIXED (35/53)
Departure	26% (26/99)	0% (0/38)	17% (6/35)
Separation & Infidelity	37% (37/99)	18% (7/38)	34% (12/35)
Simple Infidelity	12% (12/99)	11% (4/38)	3% (1/35)
Physical Violence	17% (17/99)	68% (26/38)	40% (14/35)
Other	7% (7/99)	3% (1/38)	6% (2/35)

these decisions nor how those decisions break down on gender lines. My study tries to reconstruct provocation's role in manslaughter dispositions by identifying those cases in which juries *may* return manslaughter verdicts based on provocation. "Getting to the jury," therefore, not the actual verdict or holding,<sup>104</sup> is my measure of a "successful" claim.<sup>105</sup> Although this may appear to be an indirect way to study the ultimate question, it is the only way to do so without introducing deliberate legal distortions from the start: To study the verdict question directly, one would have to follow cases from police investigation through verdict and appeal, a project that could only be undertaken in a particular jurisdiction or subset of a jurisdiction (e.g., cities or counties).<sup>106</sup> Given the diversity of legal regimes governing provocation claims, conclusions drawn from a single legal jurisdiction or even multiple

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manslaughter); *id.* at 11 (stating that 58% of spousal homicide defendants who pled guilty pled to voluntary manslaughter while 12% pled to negligent manslaughter); *id.* at 17 (stating that 42% of spouse murder convictions were for nonnegligent manslaughter). These figures do not include divorced couples, nor are the voluntary manslaughter dispositions limited to cases of provoked manslaughter as opposed to reckless manslaughter or manslaughter based on imperfect self-defense.

102. To determine the number of separated couples in my MPC data set, one cannot simply add the "departure" and "separation and infidelity" categories in this table. For example, the departure category only includes those separations known to be initiated by the provoking party. Note that the columns may not add to 100% because of rounding.

103. The numerator in this fraction refers to the total number of claims resulting in jury instructions. The denominator refers to the total number of claims in the data set, whether or not they reached a jury.

104. Not surprisingly, the vast majority of cases in my MPC sample are cases in which the law permitted the jury to reach a manslaughter verdict based on EED, but the jury chose to return a murder verdict.

105. For a similar measure of success, see Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 406 (1991) (basing empirical study of self-defense claims on question of whether defendant is "able to get to the jury" on self-defense issue).

106. Courts do not ordinarily keep criminal dockets in ways that permit searches for all cases by type of verdict or charge or defense. Cases are filed and compiled in ways that make it easier for courts and lawyers to do their jobs—by case name and number. To find all claims in which a heat of passion defense is raised before or during trial, one would have to cull police files to find all intimate homicides, then follow each police file through to the prosecutor's files and then to the trial transcript and appeal (if any). In short, the effort would be enormous and the result might well be anomalous.



jurisdictions that follow similar rules might provide a decidedly skewed picture of trial practice.<sup>107</sup>

My focus on trial instructions, rather than outcomes, also reflects the limits of research based on reported cases. Obviously, reported cases cannot be used to count up verdicts because reported cases do not reflect the full range of possible dispositions by plea, acquittal, or dismissal. We know, however, from existing research that manslaughter dispositions predominate in spousal murder cases. My study simply tries to fill in the blanks left by this research, using reported cases as accounts of what happened at trial. Obviously, this method may suffer from limitations.<sup>108</sup> Indeed, any research based on reported cases suffers from important limitations.<sup>109</sup> My method, however, does not raise the most obvious shortcomings of opinion-based research. I have not searched for legal holdings.<sup>110</sup> The vast majority of my MPC cases (eighty-three percent) (111/133) did not go up on appeal for failure to instruct on provocation.<sup>111</sup> I have used opinions just as one might use newspaper accounts or police reports—as reports of the facts in particular cases—and I have searched for an “outcome” that reflects events that happened at trial (an instruction), not what happened on appeal. Relying on opinions for factual

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107. For example, if one picked Albany, Hartford, and Portland as one's sample cities, one would achieve results that would tend to suggest that the entire country follows the “reform” approach, a conclusion that is not correct.

108. Most notably the sample leaves out cases resolved by guilty plea or dismissed before trial. See LANGAN & DAWSON, *supra* note 66, at 5, 11 (indicating that, in spousal homicide cases, 43% of arrests result in a guilty plea and 13% do not lead to prosecution). One might argue that by omitting cases that led to pleas, I have overemphasized the “hard” cases and that is why we are likely to see more “departure/separation” cases than expected. This argument makes several assumptions, however, that are unlikely to hold. First, if my data were skewed toward departure/separation because departure cases were more often appealed or reported, one would expect my overall results to be inconsistent with existing data on separation drawn from other sources. In fact, my results on “separation” are quite consistent with data drawn from other sources. See *supra* note 85. Second, this argument assumes that separation would have a significant legal impact on the decision to plead when in fact this may not be the case. At least within an MPC or mixed jurisdiction, there is nothing “harder” or “easier” about a case because of departure or separation. Indeed, there is good reason to believe that most of the cases in my MPC and mixed samples would be classified as “easy” provocation claims since the vast majority were never appealed on the provocation question. Third, even if the hard cases going to trial are the ones about “departure” and the easy ones about “infidelity” were pled, this would not account for the role of “departure” in the infidelity cases. Assuming that all of the departure cases that I identify turned out to include infidelity, that would not change my basic conclusion that the role of departure is “ignored” in these cases and that courts and commentators had wrongly assumed that infidelity was the sole determining factor.

109. This applies to studies of trial or appellate cases, based on reported outcomes in civil or criminal contexts. See, e.g., Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1766 n.71 (1990).

110. “Holdings” on provocation typically occur when there has been a failure to instruct on provocation. A sample based on appellate holdings would yield, by definition, very few successful cases. It would also tend to provide a rather skewed picture of legal practice because it would not give any sense of the cases in which juries were actually instructed on provocation.

111. Instead, the cases reached the appellate court for other reasons. See, e.g., *State v. Fair*, 496 A.2d 461, 462–63 (Conn. 1985) (appealing on grounds that compelled psychiatric examination violated privilege against self-incrimination and that admission of psychiatric testimony based on presentence report was improper).

reports has its disadvantages,<sup>112</sup> but they are not disadvantages that significantly skew my research from the start. My purpose here is comparative: to compare what we know about instructional practices in MPC jurisdictions (based on all reported cases in all MPC jurisdictions) with likely practice in other jurisdictions (based on all reported cases within selected jurisdictions). Cross-jurisdictional hypothesis testing of this sort is not impugned by data based on reported outcomes, because each jurisdiction's data is based on the same data source.<sup>113</sup> Finally, let me emphasize that my purpose is to suggest differences in legal practices across jurisdictions based on a universe of cases from MPC jurisdictions. It is neither to prove the statistical likelihood of any particular kind of provocation claim nor to establish the likelihood of a manslaughter verdict or plea.

### C. *Departure*

*Darrell Perry's stepdaughter obtained a protective order directing the defendant to vacate the home he shared with his then-bedridden wife. "After Perry removed some personal effects from the home," the Deputy Sheriff charged with executing the warrant turned to leave.<sup>114</sup> Perry fired five shots at the deputy, then physically attacked him. "When Perry finally stopped, he stuffed the restraining order in [the sheriff's] mouth and left in the deputy's cruiser," attempting to back over the wounded man before leaving the scene. He drove to his business, picked up more ammunition and another pistol, "drove his van to a residence where his bedridden wife was located," and asked his step-grandson where his wife was. Perry then struggled with the young man, shooting him in the stomach.<sup>115</sup> The defendant was charged with two counts of attempted murder, and the jury was instructed that it could return a verdict of attempted manslaughter or assault based on extreme emotional disturbance.<sup>116</sup>*

*On the evening of April 24, 1983, Carlos Guevara and his wife argued about her intent to institute a divorce proceeding. "During the argument, the defendant left the room, obtained a two-foot-long wooden board and returned to beat his wife about the face and neck. When she collapsed on the bed but*

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112. One might argue that appellate cases will inevitably skew results because the facts are told from the prosecution's view when the claim on appeal is insufficient evidence to support the jury's verdict. That is only one, however, of the many types of claims raised on appeal in my data set. Other claims, based on evidentiary objections or the propriety of particular wording of instructions, view the evidence from precisely the opposite direction. There is no reason to believe that there is a single set of biases reflected in the report of factual material.

113. See Appendix A for a discussion of the statistical viability of the comparisons made across jurisdictions.

114. *Perry v. Commonwealth*, 839 S.W.2d 268, 269 (Ky. 1992).

115. *Id.* at 270.

116. *See id.*

*continued to move, the defendant tied her legs together.”*<sup>117</sup> *Then, the defendant “searched the room for the divorce papers, found them, fled through the bedroom window, and returned to his girlfriend’s apartment in the Bronx.”*<sup>118</sup> *The jury was instructed that it could return a manslaughter verdict based on extreme emotional disturbance.*<sup>119</sup>

“She<sup>120</sup> left,”<sup>121</sup> “she rejected me,”<sup>122</sup> “she filed a warrant,”<sup>123</sup> “she kicked me out”.<sup>124</sup> These are cases I class under the heading, *departure*. Departure is not an official category in the law of murder, but it is a frequent factual scenario in intimate murder cases in reform jurisdictions.<sup>125</sup> In my study, over one-quarter of the MPC claims (twenty-six percent) that reached juries involved what I classify as a *departure*. By contrast, in common law jurisdictions, no departure claim in this category reached a jury.<sup>126</sup> In none of these departure claims did the court report that the defendant acted because the victim was having an affair.<sup>127</sup> In each, there was evidence that the “provoking” party sought to leave the relationship and that the parties’ relationship was over, ending, or about to end. In all but one case, the

117. *People v. Guevara*, 521 N.Y.S.2d 292, 293 (App. Div. 1987).

118. *Id.*

119. *See also id.* at 294 (“The court’s charge on extreme emotional disturbance was proper . . .”).

120. I have chosen in what follows to let the data dictate the pronouns. Combining all categories except physical violence, 97% of the MPC defendants are male; to use the term “he or she” in these circumstances would be inaccurate. In physical violence cases, however, where the distribution of sexes is far more even, I have used the term “he or she.”

121. *State v. Fair*, 496 A.2d 461, 462 (Conn. 1985) (“On December 26, 1980, the victim left the defendant, taking the child with her. She notified the defendant on December 28 that she intended to move to Boston and that he would never see their son again.”).

122. *People v. Fardan*, 628 N.E.2d 41, 42 (N.Y. 1993) (“At trial, defendant’s principal contention was that he acted under extreme emotional disturbance, brought on by the victim’s refusal to have sex, and therefore was liable only for manslaughter and not murder.”).

123. *Matthews v. Commonwealth*, 709 S.W.2d 414, 418–19 (Ky. 1985) (noting that defendant used his wife’s “supposedly unjustified bringing of warrants” to explain his emotional state).

124. *State v. Dilger*, 338 N.W.2d 87, 88 (N.D. 1983) (stating that after argument in bar next door to apartment, victim made two trips bringing defendant’s belongings to bar, and defendant was teased that he would have to sleep in bar).

125. *See* Appendix B (listing MPC “departure” cases).

126. This figure is based on the departure cases that reached juries (26) as compared to the total number of claims that reached juries (99) in the MPC data set. *See supra* Table B. As a percentage of all claims, reaching juries or not, departures represented 33 of 133, or 25%. *See id.*

127. It is possible, of course, that appellate reports simply fail to report an affair. I do not claim that these opinions are always factually accurate; on the other hand, I see no reason to believe that there would be systematic bias against reporting infidelities in these cases. Indeed, the cases are far more likely to omit mention of departure or intent to depart unless it is central to the situation triggering an EED claim. Even if it turned out, upon examination of the trial transcripts in these cases, that a significant number involved a third party, that would not undermine my overarching claim about the “legal rationality” of departure. The same reports on which I rely are the ones that lawyers and judges will use to determine the boundaries of the defense. Moreover, my point is not simply to emphasize cases involving departure alone. Even if all of these cases turned out to involve claims of infidelity as well, it would still mean that departure is as significant an element in the cases as infidelity, a conclusion that challenges the law’s standard image of intimate homicide and provoking circumstances.

provoking party was a woman.<sup>128</sup>

*Departure* claims involve a wide range of situations inspiring rage, from divorce to rejection, from protective orders to broken engagements. On one end of the spectrum are cases of legally enforced departure, in which one partner forces the other to leave by obtaining a protective order.<sup>129</sup> At the other end are cases that amount to "rejection" in dating or other casual relationships.<sup>130</sup> Somewhere in between these two extremes are the majority of cases, cases in which the victim moves the furniture out,<sup>131</sup> announces that she is leaving,<sup>132</sup> or files for divorce.<sup>133</sup> In all cases, the defendant's legal theory depended in whole or in part upon the separation.<sup>134</sup> Often, however, defendants sought to shift the equities against their intimate partner<sup>135</sup> by claiming that the "break up" was really her "fault".<sup>136</sup> for example, because

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128. The prosecution made the "departure" claim in this case. *See* *People v. Ambrose*, 553 N.Y.S.2d 896, 896 (App. Div. 1990) (noting defendant's claims that she killed because of abuse and threats to her child and prosecution's claim that she killed because he was going to "leave her").

129. *See, e.g., Perry v. Commonwealth*, 839 S.W.2d 268, 269–70 (Ky. 1992) (reporting that defendant claimed extreme emotional disturbance as defense to incident after defendant was served restraining order); *Matthews v. Commonwealth*, 709 S.W.2d 414, 417–18 (Ky. 1985) (wife's "swearing out warrants," one of which was based on sexual abuse of daughter, was part of marital strife underlying provocation claim). Protective orders figured in a number of cases, although it is not clear in all of them whether the defendant relied upon the orders as part of his EED claim. *See, e.g., State v. Wille*, 858 P.2d 128, 130 (Or. 1993) (stating that victim had obtained temporary restraining order preventing defendant from entering her residence); *see also* cases cited *infra* note 177.

130. *See People v. Wood*, 568 N.Y.S.2d 651, 652 (App. Div. 1991) (noting defendant's claim at second trial that he snapped, "triggered by his dissatisfaction with the victim who reportedly turned her back on him and went to sleep after they engaged in sexual intercourse"), *aff'd*, 591 N.E.2d 1178 (N.Y. 1992); *see also People v. Fardan*, 628 N.E.2d 41, 42 (N.Y. 1993) (defendant claimed victim's refusal to have sex triggered "extreme emotional disturbance").

131. *See State v. Reams*, 616 P.2d 498, 499 (Or. Ct. App. 1980), *aff'd and remanded*, 636 P.2d 913 (Or. 1981).

132. *See People v. Benedict*, 609 N.Y.S.2d 100, 100 (App. Div. 1994) ("At trial—in an attempt to prove that he was acting under extreme emotional disturbance as a defense to the intentional murder charge—defendant explained that he had been arguing with his wife over her suggestion that they separate.").

133. *See, e.g., People v. Guevara*, 521 N.Y.S.2d 292, 292–94 (App. Div. 1987) (noting that defendant and his wife "argued . . . about her intent to institute a divorce proceeding" and that after fatally beating his wife, defendant searched room for divorce papers); *Wille*, 858 P.2d at 130 ("Defendant was very upset that his wife had filed for a dissolution.").

134. In all cases classified as "departure," the case reported that the provoking party sought to leave or had left the relationship. This includes a case in which the defendant is the one who actually leaves the home, but it is at the victim/provoking party's initiative. *See, e.g., State v. Blades*, 626 A.2d 273, 275 (Conn. 1993) (reporting that defendant left home because of marital difficulties and that victim wanted him to leave because she was afraid of him and wanted divorce).

135. That the defendant blames the provoking party for the disintegration of the relationship does not disqualify the claim as a "departure." For even when the defendant asserts a reason for the leaving or the breakup (e.g., her complaints), those reasons depend for their plausibility upon their context within a relationship that is ending or over. Imagine that a defendant claimed that his brother "complained" too much and that was the "reason" for his rage and one quickly sees how the context (e.g., the breakup) is essential to the defendant's claims.

136. As I indicated earlier, I use the term "her" to reflect my data. In my data set, there was only one MPC case in which a female defendant's claim was predicated on "departure" and the "departure" claim was made by the prosecution. *See People v. Ambrose*, 553 N.Y.S.2d 896, 896 (App. Div. 1990) (reporting defendant's claim that she killed because of abuse and fear for her child and prosecution's claim that she killed because he was going to "leave her").

she claimed that he was sexually abusing their daughter, because she complained too much about his drug use, or because she refused to let him see the children.<sup>137</sup>

At the extremes, these cases bear little resemblance to the conventional image of a crime of passion. They also offend most common intuitions about criminal culpability. Consider *State v. Traficonda*,<sup>138</sup> a case in which “numerous witnesses” attested to the physical violence the victim suffered.<sup>139</sup> In considering the defendant’s argument that the jury’s murder verdict should be reduced to manslaughter, the Supreme Court of Connecticut recounted detailed evidence of “mental and physical abuse of the victim.”<sup>140</sup> The victim had asked police to remove from her home the Winchester rifle that ultimately killed her and had consulted a lawyer two days before the shooting about a divorce.<sup>141</sup> The court noted that most of the evidence supporting the defendant’s EED defense “pointed to the defendant’s mental and physical abuse of the victim.”<sup>142</sup> If one pauses, however, that statement reveals quite an astonishing admission. After all, it means that the trial court was willing to allow the jury to return a manslaughter verdict based, at least in part, on the defendant’s *own* violent acts.<sup>143</sup>

*Traficonda* may be an unusual case, but it is not as rare as one might expect. The MPC asks juries to consider the defendant’s “situation,” and sometimes those situations include not only the defendant’s perception of the situation but also his perception of the equities of the situation.<sup>144</sup> For example, the defendant in the *Guevara*<sup>145</sup> case, summarized above, came

137. See *McGee v. Delaware*, 1990 WL 254349, at \*\*1 (Del. Super. Ct. Dec. 11, 1990) (reporting defendant’s argument that he was entitled to an EED instruction because his wife’s “complaints about his drug use” caused him stress); *Jones v. Hawaii*, 902 P.2d 965, 967 (Haw. 1995) (reporting defendant’s claim that victim refused to speak to him about child visitation); *Matthews v. Commonwealth*, 709 S.W.2d 414 (Ky. 1985) (reporting defendant’s argument that victim had no basis to obtain warrant for his arrest based on charges that he sexually assaulted his daughter).

138. 612 A.2d 45 (Conn. 1992).

139. *Id.* at 47.

140. *Id.* (“Sergeant Robert Flannigan testified that he had been called to the defendant’s residence to investigate a domestic dispute less than two weeks before the victim’s death. The victim, who had a cut and bruised lip, had urged Flannigan to remove the ‘30-30’ caliber Winchester rifle from their home.”).

141. See *id.* (“[The lawyer] testified that he had noticed bruises on her legs, arms and neck. He testified that the victim had told him that she was afraid that if she divorced her husband, he would attempt to obtain custody of their young child.”).

142. *Id.* at 49.

143. The defendant’s brief in *Traficonda* indicates that the defendant had accused the victim of “cheating on him.” Brief for Defendant-Appellant at 6, *State v. Traficonda*, 612 A.2d 45 (Conn. 1992) (No. S.C. 14310). Although the defendant does not appear to have relied upon this as the basis for the EED claim, nor did the appellate court mention it, I have classified *Traficonda*, for purposes of my statistical analysis, as a “separation and infidelity” claim. Nothing in the presence of those allegations, however, takes away from the analysis of the issues raised in this paragraph.

144. Often, of course, courts sitting as triers of fact reject these claims. See, e.g., *People v. Rivera*, 507 N.Y.S.2d 266, 266–67 (App. Div. 1986) (upholding trial court’s rejection of extreme emotional disturbance defense where defendant relied upon marital situation for claim of compassion when his relationship with “estranged wife was plagued by constant strife, as evidenced by their periodic separations, and was punctuated by sporadic instances of physical abuse *by the defendant*”) (emphasis added).

145. *People v. Guevara*, 521 N.Y.S.2d 292 (App. Div. 1987).

from his girlfriend's home to kill his wife, who wanted a divorce. If the law asks us to adopt the defendant's perspective, we must put on the shoes of one who is himself unfaithful to a relationship. Or consider the defendant in the *Perry*<sup>146</sup> case. In that case, the defendant became enraged when a sheriff sought to execute a court order requiring him to leave his house. If we must adopt the defendant's perspective, we must put on the shoes of one claiming that a lawful court order (obtained upon representations that the defendant had refused to leave the home and was feared by his wife) entitled him to our compassion.<sup>147</sup> In both of these cases, as in *Traficonda*, juries were permitted by law to conclude that manslaughter was the appropriate verdict based on an EED theory.<sup>148</sup> That the triers of fact in these cases returned murder verdicts does not diminish the fact that the law permitted these cases to come out quite differently, allowing defendants with essentially "unclean hands" to claim the law's leniency.<sup>149</sup>

These are fairly unusual cases, but they reflect the logic of *all* departure cases. The normative conflicts we see in *Guevara*, *Perry*, and *Traficonda* are extreme versions of the basic conflict between a law that permits spouses to leave relationships and a law that views rightful departures as partially exculpatory of murder. The law has long permitted wives and husbands to divorce, to separate, or to move away. Indeed, the law has steadily made this conduct easier, less legally burdensome, and more protected.<sup>150</sup> It has even come to encourage victims of battery to leave a violent partner. When the law of murder says that a rational jury may find that departure may reduce a murder verdict to manslaughter, it partially, but clearly, punishes the act of leaving. Although this conflict is set into high relief in cases of battered women, where "leaving" is itself the issue, these same issues apply in all cases of intimate murder predicated on separation or departure.

It is fascinating, but true, that these results appear to be the product of "liberal" reforms. In the traditional jurisdictions I studied, departure cases are

146. *Perry v. Commonwealth*, 839 S.W.2d 268 (Ky. 1992).

147. See Brief for Appellant at A-7, *Perry v. Commonwealth*, 839 S.W.2d 268 (Ky. 1992) (No. 91-SC-93-MR) (reporting that defendant's version of affidavit supporting protective order included claim that Perry had "refused and failed" to vacate and that his wife had expressed her fear that Perry "will seriously harm her"). The protective order was sought in connection with an action by the defendant's daughter-in-law to annul the recent marriage of the defendant to her mother, who was dying of cancer. See *id.* at 12-13, app. at A-2. The Supreme Court's opinion indicates that Perry had no basis for believing that the protective order was procedurally or substantively defective. See *Perry*, 839 S.W.2d at 271.

148. In fairness to the defendant, he claimed at trial that his daughter-in-law had taken his wife, without his knowledge or approval, and that he was upset because his wife was dying. See Brief for Appellant at 12-13, *Perry* (No. 91-SC-93-MR).

149. That "jurors invoke certain rules within a ruleless EED redounds not to the EED, but to the jurors." Norman J. Finkel, *Achilles Fuming, Odysseus Stewing, and Hamlet Brooding: On the Story of the Murder/Manslaughter Distinction*, 74 NEB. L. REV. 742, 803 (1995); cf. Dressler, *Reflections*, *supra* note 24, at 752-53 (arguing that jurors' ultimate rejection of provocation defense in homosexual advance cases undercuts argument that defense is homophobic).

150. See generally Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (noting emergence of notions of individual privacy and decisional autonomy in family law).

rare and almost never reach juries. As Table C indicates, departure cases constitute a significant percentage of provocation claims reaching juries in MPC jurisdictions (twenty-six percent). None reached a jury in the traditional, common law jurisdictions I studied (zero percent).<sup>151</sup> If this data suggests that law reform has brought us here, one might still wonder whether the MPC’s approach is an aberrant interpretation, rejected in other jurisdictions. To check this, I compared the MPC results against selected “mixed” jurisdictions, jurisdictions following some traditional rules but significantly liberalizing the defense. The results of that research suggest that my MPC findings are not obviously anomalous. Departure cases reach juries in other jurisdictions, although not as frequently, or as uniformly, as in MPC states. As Table C indicates, in the mixed jurisdictions I studied, successful departure claims were less common than in the MPC data set, making up seventeen percent of all claims reaching juries. At the same time, however, such claims were far more common than in traditional jurisdictions where none reached juries. Similarly, the success rate for departure claims in mixed jurisdictions (eighty-six percent) is far closer to the MPC rate (seventy-nine percent) than that of traditional, common law jurisdictions (zero percent).

TABLE C. DEPARTURE CLAIMS REACHING JURIES BY JURISDICTION

DEPARTURES	TYPE OF JURISDICTION		
	MPC	TRADITIONAL	MIXED
% of Total <sup>152</sup>	26% (26/99)	0% (0/38)	17% (6/35)
Success Rate <sup>153</sup>	79% (26/33)	0% (0/38)	86% (6/7)

If this is really MPC trial practice, one might ask, why is it that we have not seen it before? In part, we have not seen it because we were simply not looking for it: Culture and law have conspired to make us see departure as a species of infidelity, as a wrong of some kind, even as the law elsewhere affirms the right to depart.<sup>154</sup> Appellate holdings have also obscured our view of underlying trial practice. Scattered MPC opinions can be found in which courts affirm a trier of fact’s determination of “unreasonableness” or a court’s refusal to grant an instruction in cases similar to those discussed here.<sup>155</sup> For

151. I am not an advocate of the traditional approach. My point here is simply to contrast the legal practice of reform jurisdictions with that of more conservative ones.

152. By “% of total,” I mean the number of departure cases reaching juries as a percentage of all cases reaching juries.

153. “Success rate” means the percentage of all “departure” claims reaching juries.

154. In part, we have not seen it because juries quite frequently reject such claims. As I have already indicated, that wisdom speaks better of the jurors than of the law. *See supra* note 149.

155. *See, e.g.,* *People v. Murden*, 593 N.Y.S.2d 837, 838 (App. Div. 1993) (affirming failure to instruct based on defendant’s “engaging in an argument with the victim prior to the crime” or “claimed difficulties between the defendant and his girlfriend”); *People v. Feris*, 535 N.Y.S.2d 17, 18 (App. Div.

example, in *People v. Casassa*<sup>156</sup> (a case reprinted in various criminal law case books),<sup>157</sup> the victim and defendant had “dated casually” until the victim told the defendant that she was “not ‘falling in love’” with him.<sup>158</sup> The defendant responded to that rejection with what the court called a “bizarre series of actions” that included stalking the victim and ultimately killing her.<sup>159</sup> The appellate court affirmed the trial court’s ruling that the defendant’s claims were so “peculiar to him” that they could not be considered reasonable.<sup>160</sup>

Focusing on cases like *Casassa* may suggest to the casual observer that departure plays an insignificant role in reform cases. Actual practice, however, is clearly to the contrary. As Table C shows, *Casassa*’s factual pattern is far from the “peculiarity” that the court termed it. Similar cases go to juries on a regular basis in MPC states. Indeed, careful attention to the procedural posture of *Casassa* explains why. The court in *Casassa* affirmed a finding of law and fact by a judge sitting as the trier of fact. *Casassa* never held that instructions should *not* be given in departure cases. Indeed, it was only because the trial judge *did* consider the defendant’s EED claim that the decision was affirmed. Presumably, such a holding actually encourages instructions by suggesting that triers of fact should consider whether a rejection-prompted killing is supported by a “reasonable excuse or explanation.”<sup>161</sup>

Of course, there may be other explanations for this instructional practice. As a practical matter, judges may send almost every case to a jury under the MPC for fear of reversal on appeal or with the hope that the jury is unlikely to return a manslaughter verdict. Even if true, however, this begs the question. My point is that the decision to send the case to a jury itself has legal meaning. If my data show anything, it is that the legal standard matters in instructional practice. Expedience may explain the practice, but it neither sets the legal standard nor accounts for its legitimacy. One cannot answer questions about the proper legal practice by asserting the existence of an expedient one.

Finally, other factors might explain this instructional practice. These cases might get to juries not, for example, “because” of the departure but because courts have been moved by evidence of a psychiatric disorder. Without

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1988) (affirming in memorandum opinion failure to instruct based on “defendant’s jealousy and anger over the complainant’s new boyfriend”). *But see* *People v. White*, 581 N.Y.S.2d 651, 653 (1992) (stating that “defendant may have met his burden with respect to the first element of the affirmative defense by evidence of a violent and tumultuous relationship with his wife”); *People v. Guevara*, 521 N.Y.S.2d 292, 293 (App. Div. 1987) (reporting that EED instruction was given in case in which wife’s “intent to institute a divorce proceeding” prompted fatal beating).

156. 404 N.E.2d 1310 (N.Y. 1980).

157. *See, e.g.*, KADISH & SCHULHOFER, *supra* note 55, at 420–23; LOW ET AL., *supra* note 1, at 896–902.

158. *Casassa*, 404 N.E.2d at 1312.

159. *See id.*

160. *See id.* at 1313.

161. MODEL PENAL CODE § 210.3 (1985).



question, the EED formulation has encouraged defendants' reliance on expert psychological testimony, even though most jurisdictions do not require such evidence.<sup>162</sup> Indeed, there is some reason to believe that psychiatric evidence might incline both judges and juries to treat the defendant's claims more sympathetically.<sup>163</sup> Ultimately, however, this practice does not answer the question we are asking about the defense. Unless the provocation defense is to become a different defense (e.g., diminished capacity), an emotional impairment itself cannot be the "reasonable" explanation for the rage.<sup>164</sup> The MPC drafters may have contemplated such an interpretation, but no court has openly embraced that view. Nor would one sit easily with the text of Model Penal Code section 210.3, which requires a "reasonable excuse or explanation" for the defendant's emotional distress, not simply the presence of an emotional disorder.<sup>165</sup> As long as the law purports to claim for itself some critical evaluation of the defendant's claimed emotion, the defense must rest upon something other than claims of diminished capacity or mental illness alone.

#### D. *Can One Be Unfaithful to a Relationship That Is Over?*

*"In April, 1985, the defendant's wife . . . left the defendant because of his drinking problem and moved to Connecticut. In May, 1985, [she] filed for divorce and a restraining order was issued against the defendant."<sup>166</sup> The next month, her husband drove to see her in Connecticut. She spoke to him at her neighbors' house and "told [him] that she wanted to end their marriage."<sup>167</sup> There are indications that during this or other conversations, they spoke of his allegations that she had been seeing another man. Twenty minutes later, the defendant drove to his wife's location, and they had an argument that ended in a scuffle, during which defendant "repeatedly stabbed the victim."<sup>168</sup> The jury was instructed that it could return a manslaughter verdict based on EED.<sup>169</sup>*

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162. See Singer, *supra* note 53, at 298–304 (discussing psychological focus of MPC defense).

163. Based on his research, Professor Norman Finkel, a professor of psychology, argues that the MPC's subjective formulation tends to influence judges and juries to view the defendant's claims through the lens of a "naïve," "anything goes" psychology. See Finkel, *supra* note 149, at 798–99.

164. See *Wellman v. Commonwealth*, 694 S.W.2d 696, 697–98 (Ky. 1985) ("[M]ental illness may be considered . . . when there is probative, tangible and independent evidence of initiating circumstances, such as provocation at the time of his act which is contended to arouse extreme emotional disturbance. It is not such a disturbance standing alone.").

165. See *People v. Casassa*, 404 N.E.2d 1310, 1316 (N.Y. 1980) ("The ultimate test . . . is objective; there must be 'reasonable' explanation or excuse for the actor's disturbance.") (citing MODEL PENAL CODE § 201.3 commentary at 41 (1959)).

166. *State v. Hull*, 556 A.2d 154, 157 (Conn. 1989).

167. *Id.*

168. *Id.*

169. See *id.* at 165.

*"On the morning of April 11, 1988, defendant, armed with a shotgun, confronted the victim outside the victim's apartment. An argument followed, and the defendant . . . shot the victim four times at close range . . ."*<sup>170</sup> *"At the time of the killing, the victim had been dating a woman whom defendant had dated for a short time a year and a half earlier, and whom defendant had continued to pursue, against her wishes."*<sup>171</sup> At trial, the defendant "did not contest the State's claim that the killing was intentional and so testified. He characterized the slaying as 'an acceptable solution [that] . . . made sense,' even though he knew it was wrong."<sup>172</sup> The jury was instructed that it could return a verdict of manslaughter based on extreme emotional distress.<sup>173</sup>

The classic story of intimate murder assumes a continuing relationship. Indeed, infidelity implies an ongoing relationship to which the parties are expected to be faithful. But what if the parties are legally divorced? Separated by force of law? What if the defendant finds the rival in the arms of his *ex*-wife, *ex*-lover, or *ex*-girlfriend? A jilted lover snaps when he sees his *former* girlfriend "dancing" with another man? A battered woman is thwarted by physical violence when she *tries to leave* for another? Seen through the lens of infidelity, these cases may seem only minor extensions of our canonical image of a crime of passion. Seen through the lens of departure, however, these cases challenge us to ask whether it is possible to be unfaithful to a relationship if one party believes that there is no relationship at all.

In MPC jurisdictions, unlike traditional ones, I found three times as many infidelity cases reporting separation (thirty-seven percent)<sup>174</sup> as cases of infidelity in a continuing relationship (twelve percent).<sup>175</sup> Indeed, cases of "separation and infidelity" are the single largest category in reform jurisdictions. In all of these cases, the relationship was ending or was over. Consider, for example, the *Hull*<sup>176</sup> case cited above. The victim moved, sought to end her marriage, filed for divorce, notified the police, and obtained a restraining order.<sup>177</sup> Testimony at trial suggested that the victim told the

170. *Rodebaugh v. State*, No. 436, 1990 WL 254365, at \*\*1 (Del. Nov. 27, 1990).

171. *Id.*

172. *Id.* These facts are drawn from an unpublished opinion that appears at 586 A.2d 1203 (Del. 1990) but appears in full at *Rodebaugh*, No. 436, 1990 WL 254365. The facts about the trial instruction appear in *State v. Rodebaugh*, CR.A. Nos. IN88-04-0668R2, IN88-04-0669R2, 1993 WL 603334, at \*1 (Del. Super. Ct. Mar. 5, 1993), *aff'd*, No. 123, 1994 WL 91251 (Del. Mar. 16, 1994).

173. See *Rodebaugh*, 1993 WL 603334, at \*1 (noting that "[t]he Court gave appropriate instructions regarding . . . the defendant's burden of proof on his claim of extreme emotional distress").

174. See Appendix B (listing "separation and infidelity" cases).

175. See *id.* (listing "simple infidelity" cases).

176. *State v. Hull*, 556 A.2d 154 (Conn. 1989).

177. See *id.* at 157 ("In May, 1985, the victim filed for divorce and a restraining order was issued against the defendant"; in June, she was killed by her husband.). Other cases in the "separation and infidelity" category also involved protective orders. See *People v. Fediuk*, 480 N.Y.S.2d 913, 914-16 (App. Div. 1984) (describing case in which defendant's wife moved out and obtained protective order, and when defendant found out she loved another man, he killed his rival), *aff'd*, 489 N.E.2d 732 (N.Y. 1985); see also *People v. White*, 590 N.E.2d 236, 238 (N.Y. 1992) (describing court's finding that defendant meets

defendant that she would not return and may have "mentioned another man,"<sup>178</sup> or told the defendant that "'he could believe what he wanted to believe about the rumors'" about another man.<sup>179</sup> Clearly, this case is not simply about a rival (even if we assume that there is another man, as my methodology requires). One party has sought to end the relationship, and the other refuses to accede to that choice, killing the party who seeks to leave.

Not only does the category of "separation and infidelity" include cases such as *Hull* in which the departure figures prominently, but it also includes claims in which departure is harder to see. Consider the case of Camelia Bellido. She had lived with Jose Rivera for nineteen years, and the couple had four children. In 1986, the couple separated and Bellido rented her own apartment. When Rivera learned that she was seeing someone else, he became enraged and killed his rival.<sup>180</sup> This sounds like a classic case of betrayal and infidelity; just the story the court told. Implicit in this description is the judgment that Camelia had betrayed her common law husband, breaching her obligations of loyalty to him. But it turns out, reading closely, that Camelia left Rivera three years before the murder.<sup>181</sup> Seen as a case of infidelity, the lapse of time might seem hardly noticeable; seen without the lens of infidelity, we recognize that the defendant was claiming an emotional attachment to a relationship that his partner did not share.

These cases are not aberrations. Cases of claimed "infidelity" in which the relationship was ending or over represent a significant percentage of the MPC cases I studied.<sup>182</sup> For example, in the *Rodebaugh* case described above, the

objective prong of EED standard based on "violent and tumultuous relationship with his wife," relationship that produced protective order and arrest based on incident in which, among other things, her avowals of her infidelities had caused him to beat her with iron pipe "in self-defense") (citing *People v. White*, 564 N.Y.S.2d 314, 315 (App. Div. 1991)).

178. *Hull*, 556 A.2d at 165.

179. *Id.* at 166 (quoting witness testimony).

180. *See State v. Rivera*, 612 A.2d 749, 750–51 (Conn. 1992).

181. *See id.* at 750 ("Some time in 1986, . . . the couple separated, and in August of 1989 [the month of the murder], Bellido was dating the victim.").

182. *See, e.g., State v. Chicano*, 584 A.2d 425 (Conn. 1990) (describing case in which two months after relationship deteriorates, defendant sees victim visited by another, overhears sounds he believes are sexual activity, waits for half-hour, hides in house for one hour, and kills rival); *State v. Ricketts*, 659 A.2d 188, 189–90 (Conn. App. Ct. 1995) (describing case in which defendant moves out of lover's apartment in early 1991; in July of 1991, defendant kills victim when he sees another man attempting to visit her); *State v. Burgos*, 656 A.2d 238, 239–40 (Conn. App. Ct. 1995) (describing case in which defendant moves out in summer of 1991 because victim is having an affair; on September 28, 1991, defendant kills victim after she tells him she is leaving him); *Re v. State*, 540 A.2d 423, 424–25 (Del. 1988) (describing case in which after short and violent marriage, defendant goes to house where victim is staying; when she returns with a date, he kills her); *Casalvera v. State*, 410 A.2d 1369, 1371 (Del. 1980) (describing case in which defendant moves away and victim seeks to end relationship; they set date to see each other, but victim refuses to call him; when victim tells him that "things had changed" and she was seeing someone else, defendant kills victim); *State v. Steedley*, Nos. IK90-06-0183R1, IK90-06-0184R1, IK90-06-0185R1, IK90-06-0186R1, 1994 WL 750302, at \*1–2 (Del. Super. Ct. Dec. 8, 1994) (describing case in which defendant filed for divorce in 1989, victim rejected reconciliation attempt seven months later after defendant threatened to kill her; the weekend after divorce becomes final, defendant kills ex-wife and new lover); *State v. Maurer*, 770 P.2d 981, 981–82 (Utah 1989) (describing case in which victim breaks off engagement

defendant dated a woman "briefly," a year and a half before.<sup>183</sup> He killed the woman's new boyfriend in a jealous rage. Other MPC cases reveal relationships that have been "over" for substantial periods of time,<sup>184</sup> indeed, relationships that have been legally severed.<sup>185</sup> The pattern of these stories soon becomes familiar. The court narrates a story of infidelity. Only later do we see the claims of departure—that the victim was divorced from the man now claiming her loyalty, that she had left because she believed he was abusing their daughter,<sup>186</sup> that she sought shelter in a home for battered women.<sup>187</sup> Indeed, on occasion, defendants themselves reveal that it is the departure as much as the infidelity that prompted their rage.<sup>188</sup>

We may rightly ask in these cases why the relationship lingers after life or law has ended it. At what point, for example, does Rivera's emotional attachment to Camelia Bellido begin to become "irrational"? At four years? At five? At what point does Rodebaugh's claim of attachment to a woman he dated a year and a half earlier expire? Murder law may well want to acknowledge the emotional ties of relationships, but it cannot at the same time ignore the other side of the story. Existing law *assumes* that defendants' claims of attachment are "rational," even in cases where time or other factors suggest quite the contrary. In such cases, the law of murder does in so-called "infidelity" cases just what it does in "departure" cases: It allows defendants to enforce a relationship by claiming an emotional attachment that the victim has repudiated. Given that the criminal law rarely if ever embraces those who

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when she feels affection for another; as they are discussing this and she is moving defendant's possessions out of apartment, he kills her after learning that she has had sexual relations with his rival).

183. *Rodebaugh v. State*, 586 A.2d 1203 (Del. 1990) (reported in full at No. 436, 1990 WL 254365, at \*1 (Del. Nov. 27, 1990)); see *State v. Rodebaugh*, CR.A. Nos. IN88-04-0668R2, IN88-04-0669R2, 1993 WL 603334 (Del. Super. Ct. Mar. 5, 1993), *aff'd*, No. 123, 1994 WL 91251 (Del. Mar. 16, 1994).

184. See, e.g., *State v. Gaynor*, 880 P.2d 947, 948–50 (Or. Ct. App. 1994) (describing case in which parties separated and then divorced; three months after divorce and nine months after split, husband killed man his wife had just recently begun to date). This phenomenon is not limited to MPC jurisdictions. See, e.g., *People v. Ogen*, 215 Cal. Rptr. 16, 17–18 (Ct. App. 1985) (describing case in which victim moved away in February 1980, and sought to end relationship completely in July 1981; five months later, defendant raped victim; while on bail, he killed victim; provocation instruction given).

185. See, e.g., *Steedley*, 1994 WL 750302 (describing case in which parties were divorced at time of killing; jury instructed on EED); *State v. Lyon*, 672 P.2d 1358, 1359 (Or. Ct. App. 1983) (describing case in which defendant was divorced and his "ex-wife" was seeing the victim; jury instructed on EED).

186. See *State v. Wood*, 545 A.2d 1026, 1030 (Conn. 1988).

187. See *People v. Fediuk*, 480 N.Y.S.2d 913, 915 (App. Div. 1984), *aff'd*, 489 N.E.2d 732 (N.Y. 1985).

188. See, e.g., *State v. Burgos*, 656 A.2d 238, 240 (Conn. App. Ct. 1995) (reporting "separation and infidelity" case in which, during argument, defendant told victim "that he would kill her before he let her go anywhere"); *Re v. State*, 540 A.2d 423, 425 (Del. 1988) (reporting "separation and infidelity" case in which defendant said: "'Don't leave me, because if you do, I'll kill you.'" (citation omitted); *People v. Hartsock*, 592 N.Y.S.2d 511, 511 (App. Div. 1993) (reporting "separation and infidelity" case in which, "[i]n the course of an argument, during which the victim refused to reconcile with defendant and insisted that it was over between them, defendant shouted 'if I can't have you nobody else [will]'; he then fired three shots at her from his 12-gauge shotgun").

use violence in response to lawful acts,<sup>189</sup> this should be a controversial outcome in reform states, although it presently is not.

Strangely enough, such outcomes are controversial, as a doctrinal matter, in jurisdictions following the most traditional provocation rules. As Table D suggests, claims of separation and infidelity were far less likely to reach juries in traditional jurisdictions than in reform jurisdictions. Because adequate provocation requires “adultery,” which depends, by definition, upon a continuing relationship, courts in traditional states are quite hostile to claims of infidelity when the relationship is over. They have held quite explicitly that “divorced persons may not claim the benefit of the voluntary manslaughter instruction.”<sup>190</sup> Logically enough, this understanding has also been applied to *nonmarital* relationships, with courts holding that there is no reason to “afford [a provocation] instruction to unmarried persons whose relationship has ended.”<sup>191</sup> In short, common law jurisdictions have come to protect departure explicitly in ways that MPC jurisdictions neither recognize nor address.

TABLE D. SUCCESS RATES FOR SIMPLE INFIDELITY AND SEPARATION AND INFIDELITY CLAIMS REACHING JURIES<sup>192</sup>

	MPC	TRADITIONAL	MIXED
Simple Infidelity	75% (12/16)	44% (4/9)	100% (1/1)
Separation & Infidelity	88% (37/42)	39% (7/18)	60% (12/20)

E. *The Idea of Infidelity*

*The defendant and the victim had “made a decision to marry in the near future. They went to a bar in Little Rock . . . to celebrate.”<sup>193</sup> The defendant became jealous when his fiancée “asked an acquaintance to dance with her.”<sup>194</sup> He went home, and then returned at the request of the victim’s sister. When the defendant returned he saw his fiancée “again dancing with the other man,”<sup>195</sup> charged her and knocked her down. Defendant was then ejected from the bar. Later that night, he showed up at the victim’s home, and*

189. See *supra* note 19 and accompanying text (discussing “lawfulness” restrictions on other MPC defenses).

190. *People v. McCarthy*, 547 N.E.2d 459, 463 (Ill. 1989).

191. *Id.*; see also *People v. Santiago*, 582 N.E.2d 1304, 1312–13 (Ill. App. Ct. 1991) (refusing instruction where parties’ “marital-type relationship” had ended); *People v. Elder*, 579 N.E.2d 420, 424 (Ill. App. Ct. 1991) (refusing instruction where nonmarital relationship had ended two months previously).

192. These figures were calculated by determining the total number of “simple infidelity” or “separation and infidelity” claims and then determining the percentage of similarly classified claims leading to jury instructions.

193. *Dixon v. State*, 597 S.W.2d 77, 78 (Ark. 1980).

194. *Id.*

195. *Id.*

*proceeded to beat her severely until she passed out and was taken to a hospital. The victim died twelve days later. The jury was instructed on "extreme emotional disturbance" and returned a manslaughter verdict.*<sup>196</sup>

*The defendant "fully confessed to the murder of his wife, explaining that they argued when he found a letter in her purse alluding to her relationship with another man." The defendant testified that "[a]lthough he was very angry, they attempted a reconciliation only to realize that their relationship would never be the same because 'she wasn't pure anymore.' According to the defendant, she wanted him to kill her and he complied."*<sup>197</sup> *Defendant argued at trial that he killed under "extreme emotional disturbance," and the court instructed the jury that they could return a manslaughter verdict.*<sup>198</sup>

The classic claim of infidelity not only assumes a continuing relationship, it assumes a particular kind of conduct: discovery of one's lover in an act of "passion." At common law, courts required "ocular evidence of actual adultery."<sup>199</sup> Today, a minority of jurisdictions still apply that rule, rejecting claims based on a confession or knowledge of adultery.<sup>200</sup> In reform jurisdictions, the possible range of unfaithful conduct is far broader. In *State v. Martinez*,<sup>201</sup> the defendant's former boyfriend had seen her "dancing with another man," two weeks before the killing and the jury was instructed that it could return a manslaughter verdict based on EED.<sup>202</sup> In *People v. Wood*,<sup>203</sup> the defendant's theory was that the victim had "turned her back" on him after sex<sup>204</sup> and the jury was instructed that it could return an EED manslaughter verdict.

By jettisoning the adultery limitation, the MPC has done more than broaden the range of possible relationships that might give rise to a provocation claim. It has also broadened the type of conduct that might be classified as "infidelity."<sup>205</sup> Claims of "discovered adultery" appear quite rarely in my MPC data set, whether the claim arises in the context of a former

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196. *See id.* at 78–79. The appellate court found that there was sufficient evidence to support the verdict on either an EED or a recklessness theory. *See id.* at 78.

197. *People v. David*, 533 N.Y.S.2d 627, 629 (App. Div. 1988).

198. *Id.*

199. *State v. Saxon*, 86 A. 590, 594 (Conn. 1913).

200. *See* LAFAYE & SCOTT, *supra* note 14, § 7.10, at 656–57 ("The modern tendency is to extend the rule of mitigation beyond the narrow situation where one spouse actually catches the other in the act of committing adultery.").

201. 591 A.2d 155 (Conn. App. Ct. 1991).

202. *See id.* at 156 (jury returned manslaughter verdict on theory that defendant intended to cause serious injury that caused death).

203. 568 N.Y.S.2d 651 (App. Div. 1991) (reporting defendant's claim that he snapped "because of an extreme emotional disturbance triggered by his dissatisfaction with the victim who reportedly turned her back on him and went to sleep after they engaged in sexual intercourse").

204. *Id.* at 652; *see also* *People v. Wood*, 488 N.E.2d 86 (N.Y. 1985) (prior appeal).

205. *See* Appendix B (listing "simple infidelity" claims).

or a current relationship.<sup>206</sup> Far more frequent are claims based on confessions or allegations of infidelity.<sup>207</sup> Less frequent, but also present, are cases involving lesser breaches, such as “dancing with [an]other man,”<sup>208</sup> “receiv[ing] a phone call from a former boyfriend,”<sup>209</sup> or seeing the victim with another.<sup>210</sup>

As a species of infidelity, these lesser betrayals may seem trivial. And yet, reform tells us that these cases must reach a jury as readily as cases of discovered adultery. Although some MPC courts have resisted such outcomes, it remains the case that the defendant’s perception, from the defendant’s “situation,” is determinative under the MPC. Once one accepts that perspective, it becomes clear how judges might believe that a trivial rejection such as turning one’s back may support an EED instruction. What seems less clear is how the law can avoid the implications of its choice—that it partially condones the use of private violence to punish dancing, traveling, and turning. Again, that these cases reach juries should be controversial but it is not: Rarely, if

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206. Of 133 total claims in the MPC sample, only four (three percent) involved a “simple infidelity” claim that involved a current partner in anything approaching a “discovery” situation. *See Worring v. State*, 638 S.W.2d 678, 679 (Ark. Ct. App. 1982) (stating that defendant followed husband and found him seated in parked car with alleged lover); *State v. Valera*, 848 P.2d 376, 378 & n.2 (Haw. 1993) (stating that defendant followed wife to parking lot where he found her in car with alleged lover with his “pants undone”); *Smith v. Commonwealth*, 737 S.W.2d 683, 685 (Ky. 1987) (stating that defendant discovered his lover and victim with “pants down” in truck); *People v. Rowe*, 568 N.Y.S.2d 648, 649 (App. Div. 1991) (stating that defendant found rival in bedroom). Four other cases involving seven claims (another five percent) involved discovery in the context of a relationship that was ending or over. *See State v. Chicano*, 584 A.2d 425, 428 (Conn. 1990) (reporting that defendant waited outside bedroom window and heard “sounds of sexual activity” whereupon he entered house, hid in bathroom for one hour, then killed his former girlfriend, her boyfriend, and her son); *People v. Berk*, 629 N.Y.S.2d 588, 589–90 (App. Div. 1995) (reporting that defendant discovered rival in bed with estranged wife who had initiated divorce proceedings), *aff’d*, 88 N.Y.2d 257 (1996); *State v. Lyon*, 672 P.2d 1358, 1359 (Or. Ct. App. 1983) (reporting that defendant found ex-wife in bed with new lover); *State v. Florez*, 777 P.2d 452, 453 (Utah 1989) (reporting that defendant returned to former home and found ex-girlfriend in bed with lover).

207. *See, e.g., Lovelace v. Lopes*, 632 F. Supp. 306, 308 (D. Conn.) (noting confession of infidelity), *aff’d*, 802 F.2d 443 (2d Cir. 1986); *People v. David*, 533 N.Y.S.2d 627, 629 (App. Div. 1988) (noting discovery of letter alluding to another relationship); *People v. Maggio*, 494 N.Y.S.2d 424, 425 (App. Div. 1985) (noting declaration of infidelity); *State v. Davis*, 606 P.2d 671, 672 (Or. 1980) (noting “alleged sexual affair” victim had with neighbor).

208. *Dixon v. State*, 597 S.W.2d 77, 78 (Ark. 1980). Similarly, another case noted that:

Two weeks before the victim’s death, the defendant, the victim’s former boyfriend, had seen the victim dancing with another man. The night before the victim’s death, the defendant was seen throwing rocks at her window. The defendant also had been seen lingering in the vicinity of the victim’s apartment for two days prior to the incident.

*State v. Martinez*, 591 A.2d 155, 156 (Conn. 1991).

209. *People v. Aphaylath*, 499 N.Y.S.2d 823, 824 (App. Div.), *rev’d on other grounds*, 68 N.Y.2d 945 (1986); *see also* 68 N.Y.2d at 946 (characterizing claim as defendant’s “jealousy over his wife’s apparent preference for an ex-boyfriend” including unidentified displays of affection and “receiving phone calls from an unattached man”). *But see People v. Checo*, 599 N.Y.S.2d 244, 244 (App. Div. 1993) (“[Defendant’s] explanation that he experienced ‘emotion’ and ‘jealousy’ at the mere sight of his former wife in the company of another man, did not provide a ‘reasonable explanation or excuse.’”).

210. *See State v. Ott*, 686 P.2d 1001, 1004 (Or. 1984) (reporting that defendant was “angered and disappointed when his wife’s new lover appeared at the hospital”).

ever, does the law grant the protection of a defense or partial defense in cases where the act is so disproportionate to the threatened harm.<sup>211</sup>

Infidelity cases that one sees quite frequently in reform jurisdictions are unlikely to reach juries in traditional states. Common law jurisdictions continue to adhere to the category of "discovered adultery," barring claims involving confessions or allegations of infidelity. Claims based on "words alone" are thought insufficient to sustain a manslaughter verdict in traditional jurisdictions.<sup>212</sup> Moreover, courts in traditional states have expressed a good deal of skepticism about unsupported allegations of infidelity,<sup>213</sup> a skepticism unshared by courts in MPC jurisdictions. Finally, and perhaps most importantly, traditional jurisdictions often reject heat of passion claims where the infidelity was known to the defendant well before the killing, on the theory that there was no "sudden" passion.<sup>214</sup>

This last factor illustrates another way in which the logic of reform, which focuses almost exclusively on the defendant's subjective state, operates to obscure competing factual narratives. In many of the MPC cases, for example, the defendant appears to have had prior knowledge of a wife's or ex-wife's infidelity and arrived at the scene armed.<sup>215</sup> In others, the defendant appears to have made his intention to kill the victim known in advance.<sup>216</sup> In some, the claimed infidelity appears weeks before the killing.<sup>217</sup> All of these factors, which may be relevant to the determination of "sudden passion" in

211. See *supra* note 20 and accompanying text (detailing MPC defenses requiring proportionality between violence and triggering circumstances in self-defense, duress, and necessity).

212. See, e.g., *People v. Chevalier*, 544 N.E.2d 942, 944 (Ill. 1989) ("[M]ere words are insufficient provocation . . . no matter how aggravated, abusive, opprobrious or indecent the language."); *People v. Cedeno*, 635 N.E.2d 1047, 1052 (Ill. App. Ct. 1994) (applying "mere words" rule); *People v. Hightower*, 629 N.E.2d 1197, 1201 (Ill. App. Ct. 1994) (applying "mere words" rule and defending it against alleged exception).

213. See, e.g., *People v. Burts*, 628 N.E.2d 515, 519 (Ill. App. Ct. 1993) (expressing skepticism about defendant's claims of infidelity unsupported by other evidence), *vacated*, 630 N.E.2d 845 (Ill. 1994).

214. *People v. Schorle* includes a typical statement:

[D]efendant did not kill his wife immediately after discovering her in an adulterous act, or immediately prior to or after an act of adultery. The record shows that defendant loaded his gun, waited for his wife, and shot her seconds after she smiled and verbally admitted that she enjoyed the adulterous act. [These words were not] legally sufficient to reduce defendant's homicide to voluntary manslaughter.

565 N.E.2d 84, 89 (Ill. App. Ct. 1990).

215. See, e.g., *Rodebaugh v. State*, No. 436, 1990 WL 254365, at \*\*1 (Del. Nov. 27, 1990) (reporting that defendant arrived at scene armed and killed man now dating his ex-girlfriend and that EED instruction was given); *Re v. State*, 540 A.2d 423, 425 (Del. 1988) ("On the night he killed his wife Re went to the house where she was staying and waited for her to return.") (EED instruction given); *State v. Lyon*, 672 P.2d 1358, 1359 (Or. Ct. App. 1983) ("He arrived there armed with a rifle and a pistol[, which he used to kill his ex-wife's new boyfriend.]") (EED instruction given).

216. As the court noted in one such case in which an EED instruction was given, Davis, who was then separated from his wife, called his wife and threatened to kill her and her boyfriend Baird, with a gun. Davis told his wife that he was coming to the apartment complex where she lived and that he would kill both her and Baird if they were there.

*Davis v. State*, 522 A.2d 342, 342 (Del. 1987).

217. See *State v. Martinez*, 591 A.2d 155, 156 (Conn. App. Ct. 1991) ("Two weeks before the victim's death, the defendant, the victim's former boyfriend, had seen the victim dancing with another man.") (EED defense raised).



other jurisdictions, are irrelevant to a provocation claim in reform states. The MPC rejected the traditional focus on the suddenness of the emotionally provoking event, permitting claims based on emotional grievances that grew over time.<sup>218</sup> By “broaden[ing] the time frame,” as Mark Kelman has termed it,<sup>219</sup> the MPC makes the provocation claim available to defendants whose criminal acts appear not only intentional, a necessary predicate to an EED instruction, but also premeditated. By contrast, such claims typically do not reach juries in traditional states.<sup>220</sup>

F. *Physical Violence*

“She hit me, I became enraged, and killed”; “he beat me, I fought back, and killed.” Physical violence cases represented a fairly small piece of the reform “pie” (seventeen percent).<sup>221</sup> By contrast, in traditional jurisdictions, the vast majority of claims reaching juries (sixty-eight percent) involved some kind of physical violence. Unlike other categories, these cases tend to be far more evenly distributed between male and female defendants.<sup>222</sup>

TABLE E. PHYSICAL VIOLENCE CLAIMS REACHING JURIES

VIOLENCE	JURISDICTION		
	MPC	TRADITIONAL	MIXED
% of Total Claims	17% (17/99)	68% (26/38)	40% (14/35)
% Male Defendants	59% (10/17)	69% (18/26)	64% (9/14)
Success Rates	77% (17/22)	60% (26/43)	74% (14/19)

Since an assault or battery is itself a wrong, and may give rise to what the common law termed “mutual combat,” the embrace of such cases in traditional jurisdictions seems quite understandable. The difference in the two jurisdictions comes, not surprisingly, from the willingness of reform jurisdictions to tolerate more trivial forms of provocative battery. In MPC states, a relatively minor

218. See *People v. Patterson*, 347 N.E.2d 898, 908 (N.Y. 1976), *aff’d sub nom. Patterson v. New York*, 432 U.S. 197 (1977).

219. Kelman, *supra* note 64, at 601.

220. See, e.g., *People v. Elder*, 579 N.E.2d 420, 424 (Ill. App. Ct. 1991) (refusing provocation instruction in traditional jurisdiction because lack of “sudden passion” was demonstrated by fact that defendant “carried a loaded gun” and followed victim). I do not advocate a “sudden passion” rule over the “slow burn” rule. The temporal dimensions of the rule, in my opinion, stand in for other considerations. If the defense is transformed in the ways I believe that it should be, a “cumulative provocation” approach might well remain appropriate. See *infra* Part IV (arguing for “warranted excuse” theory of passion defense).

221. See Appendix B (listing physical violence cases).

222. Of all 22 MPC physical violence cases, 64% (14/22) involved male defendants.

scratch or slap may well bring a case to a jury.<sup>223</sup> By contrast, cases of "slight provocation," in which the fight is not "on equal terms,"<sup>224</sup> do not reach juries in traditional jurisdictions. At the same time, traditional jurisdictions appear more hostile to the claims of women who kill, particularly in cases involving battered women. A woman who kills her batterer in a reform jurisdiction should, under current doctrine, easily reach the jury on a theory that she was provoked.<sup>225</sup> Here, the court's opening of the "time frame" encompasses not only responses to immediate attacks, those most likely to yield a classic self-defense claim, but also cases in which there is a greater time lag. In traditional jurisdictions, however, a provocation defense may be precluded if serious physical violence did not immediately precede the killing on the theory that there was no "sudden" passion or "mutual combat."<sup>226</sup> Finally, it is important to note that in battered women's cases a heat of passion theory may be asserted against the defendant's wishes, to counter claims of perfect self-defense.<sup>227</sup>

### G. *Other Claims*

Given reformers' anticategorical approach, one might expect that many MPC cases would fall within the residual "other" category. In fact, my data suggests that residual claims are fairly rare and unlikely to reach juries in reform states.<sup>228</sup> Claims in the residual category fall into three major groups:<sup>229</sup> (1) claims that depend upon insulting remarks or arguments

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223. See *State v. D'Antuono*, 441 A.2d 846, 850 (Conn. 1982) (suggesting that court might have accepted EED defense based on defendant's testimony that he "'freaked out' when she scratched him with the carving fork," but affirming bench trial rejection of this claim).

224. *People v. Crum*, 539 N.E.2d 196, 202-03 (Ill. App. Ct. 1989) (citing *People v. Matthews*, 314 N.E.2d 15, 15 (Ill. App. Ct. 1974)).

225. See *Commonwealth v. Stonehouse*, 555 A.2d 772, 780 (Pa. 1989) (reporting that counsel was held ineffective for failing to seek instruction on cumulative provocation in case where woman was harassed and stalked over period of time and then killed her ex-boyfriend). Pennsylvania is not an MPC state, but it has adopted a cumulative provocation rule similar to the one the MPC commentary suggests.

226. See, e.g., *People v. Garcia*, 651 N.E.2d 100, 110 (Ill. 1995) (finding no "mutual combat" as matter of law in case where victim allegedly struck female defendant); *People v. Falconer*, 522 N.E.2d 903, 906-07 (Ill. App. Ct. 1988) (holding victim's slap insufficient to constitute "mutual combat" despite history of past violence by victim against female defendant).

227. See, e.g., *People v. Ambrose*, 553 N.Y.S.2d 896, 896 (App. Div. 1990) (defendant claims she killed because of abuse and threats to her child; prosecution claims she killed because her partner was going to "leave her").

228. In MPC jurisdictions, "other" claims represented only 7% (7/99) of claims reaching juries and 15% (20/133) of all claims. Of the total 20 claims, only 7 reached juries, revealing a 35% success rate. These results are not unlike those in "traditional" jurisdictions where "other" claims represented 11% (4/38) of all claims and 3% (1/38) of cases reaching juries, revealing a 25% success rate.

229. Some cases, of course, did not fall into any of these groups. See, e.g., *People v. Matthews*, 632 N.Y.S.2d 298 (App. Div. 1995) (reporting that defendant was distraught because he believed he had been infected by sexually transmitted disease and noting that no instruction was ordered because no evidence of subjective loss of self-control); *People v. Morrison*, 464 N.Y.S.2d 245 (App. Div. 1983) (reporting that defendant was distraught over wife's multiple threats and attempts to commit suicide).

between intimates (arguments not involving separation or departure),<sup>230</sup> (2) claims that look very much like a diminished capacity defense and depend primarily on psychiatric evidence; and (3) claims in which defendants present evidence from their life histories to elicit sympathy.<sup>231</sup> Claims involving "marital disputes" and "insulting" remarks represent one of the more interesting features of the "other" category. Courts are divided on whether an argument alone (without factors such as sexual infidelity or physical violence) is sufficient to support a jury verdict.<sup>232</sup> A similar approach appears in "mixed" jurisdictions.<sup>233</sup> In traditional jurisdictions, not surprisingly, claims based on arguments between intimates have typically failed.<sup>234</sup>

## II. THE THEORY OF SELF-CONTROL RECONSIDERED

So far, I have emphasized the ways in which the law has failed to appreciate the role of separation in intimate homicide cases. My argument, however, is not a claim that the victim's right to leave must cancel the defendant's right to be treated as an autonomous being. Instead, I try to show in this Part that, although reform rests on a claim to preserve the defendant's autonomy, it operates quite differently in practice. It protects something more than emotional disturbance; it protects particular reasons for emotional disturbance. If, then, it is autonomy that supports reform, it is autonomy of a peculiar kind, a freedom not only to choose, but to judge. In the end, the law of reform, like the common law before it, has selected particular relationships

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230. If a claim was based on an argument about departure, it was classified as a "departure" claim, not an "other" claim. In the interest of a conservative approach, I made one exception for a case that could be interpreted as "rejection," but which appeared significantly different from most departure/separation scenarios. That case was classified as "other." See *People v. Moye*, 489 N.E.2d 736, 738 (N.Y. 1985) (reporting that defendant decapitated woman who taunted his impotence, laughing at him and telling him: "[G]o on little boy. I don't need you.").

231. See, e.g., *State v. Skjonsby*, 319 N.W.2d 764, 779 (N.D. 1982) (defendant asserted the following as factors that establish EED: "(1) failing businesses and several lawsuits concerning those businesses; (2) problems with his relationship with Charlotte; (3) putting his grandmother in a nursing home; (4) telephone call from Kurtz and Skonsby's knowledge about Kurtz; and (5) his fear that Charlotte was in trouble").

232. See, e.g., *State v. Marino*, 462 A.2d 1021, 1028 (Conn. 1983) ("[T]he evidence of the relationship of the defendant to the victim [boyfriend/girlfriend], the quarrel which preceded the shooting and his distraught appearance at the time the police arrived [means that] . . . [w]e cannot say that the evidence was legally insufficient to establish [EED]."). But cf. *People v. Adams*, 422 N.E.2d 537 (N.Y. 1981) (noting that defendant claimed that he was entitled to EED instruction in case of murdering police officer based on claim he argued with his girlfriend about money before incident).

233. For a case in which the defendant received a heat of passion manslaughter instruction for killing his wife while she slept after a long, bitter argument, see *State v. Schmit*, 388 N.W.2d 748 (Minn. 1986). Similarly, in *State v. Werman*, 388 N.W.2d 748, 749 (Minn. Ct. App. 1986), the defendant "was angry that his wife had not returned home with him, and he threw things around the house, including leftover dinner." He "passed out" and when he came to, she had returned and they "argued about the messy house"; he then retrieved his gun and shot her. The jury was instructed on heat of passion manslaughter. But see *State v. Hoffman*, 328 N.W.2d 709, 718 (Minn. 1982) (denying heat of passion manslaughter instruction where defendant "testified that when Carol rejected his sexual advances and told him, 'Why don't you go downstairs and fuck your fat mama,' he lost control and began to choke her").

234. See, e.g., *People v. Smalley*, 621 N.E.2d 7, 10 (Ill. App. Ct. 1991) ("It is not sufficient to constitute intense provocation that the unarmed decedent and defendant had argued.").

to protect and has judged them by traditional norms of intimate loyalty, norms that remain more powerful today precisely because the law denies that it is making normative judgments. I begin this Part by looking at the conventional arguments offered to support reform's vision of the provocation defense.

### A. *The Conventional Arguments*

If the Dean of the Model Penal Code, Professor Herbert Wechsler, were alive today, I suspect that he would find nothing very strange or unfortunate about many of the cases I have discussed. He would argue that juries are right to believe that it would be both cruel and useless to punish a human being who, whether because of a loved one's departure or infidelity, was driven to kill by emotional pain.<sup>235</sup> Wechsler's focus on "self-control" has a distinguished liberal pedigree and a strong following.<sup>236</sup> In his classic work, *Punishment and Responsibility*,<sup>237</sup> H.L.A. Hart explained the theoretical basis for the idea of mitigation enshrined in the MPC.<sup>238</sup> Hart maintained that excusing conditions were necessary to maximize individual choice, to protect citizens' ability to predict and control the future.<sup>239</sup> Under this theory, any natural condition that diminishes self-control should excuse, at least partially.<sup>240</sup>

However distinguished its advocates, the liberal theory of provoked homicide leaves some very important questions unanswered. It purports to depend upon behavior (lack of self-control), but it never provides a behavioral theory. Hart, for example, concedes that he relies upon "common sense generalizations" about "human nature" for the conclusion that men are "capable of self-control when confronted with an open till but not when confronted with a wife in adultery."<sup>241</sup> In the absence of anything more

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235. See Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 717–20 (1937) [hereinafter Wechsler & Michael, *Homicide I*]; Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1280–81 (1937) [hereinafter Michael & Wechsler, *Homicide II*]; MODEL PENAL CODE § 210.3 commentary at 60–62 (1985).

236. Virtually every criminal law scholar treats the MPC defense in terms of self-control, even if ideas differ about the nature of that self-control and its relationship to normative judgments. See, e.g., FLETCHER, *supra* note 25, § 4.2.1, at 249 (arguing that "self-control" issue turns on determination of what impulses "we expect people to completely control"); LAFAVE & SCOTT, *supra* note 14, § 7.10(b), at 654 ("[W]hat is really meant by 'reasonable provocation' is provocation which causes a reasonable man to lose his normal self-control."); Dressler, *Reflections*, *supra* note 24, at 747–48 (arguing that "at some point, anger becomes so intense that people find it extremely difficult to control themselves").

237. See HART, *supra* note 33.

238. See *id.* at 46–53; Tentative Draft, *supra* note 49, § 210.3, at 47 (discussing reasons for adding defense to MPC).

239. See HART, *supra* note 33, at 49 ("In this way, the criminal law respects the claims of the individual as such, or at least as a choosing being.").

240. As Hart put it, "Justice requires that those who have special difficulties to face in keeping the law which they have broken should be punished less." *Id.* at 24.

241. *Id.* at 33 (noting that these factors come into play because of "difficulty of proof" of subjective states).

rigorous than such assumptions, one could easily imagine filling this gap with a normative theory. But reform's defenders have assiduously refused this invitation, preferring to increase rather than decrease the subjectivity of the defense.<sup>242</sup> We are left with the obvious question: Why do some losses of control count (e.g., infidelity-inspired rage), while others do not (e.g., till-inspired greed)? Modern theories of the defense have finessed these questions, embracing the language of behavioral theory, but never putting to rest the lurking normative questions. Every conventional attempt to defend passion as a mitigating factor trades upon this elision. And the Code itself, as its commentators acknowledge, is "designedly ambiguous" on this score.<sup>243</sup>

### 1. *The Quantitative Theory*

One version of the liberal self-control theory relies upon metaphors of quantity, emphasizing that the "amount" of passion differentiates murder from manslaughter.<sup>244</sup> All crimes may be acts of impulse, but crimes of manslaughter are crimes of emotional extremity.<sup>245</sup> Although intuitively appealing, this approach leaves a good deal unanswered. It provides no way to measure the degree or severity of particular mental states. Perhaps more importantly, it does not explain the defense we have. *It is the law of no state that a loss of self-control, alone, is sufficient to sustain a manslaughter verdict.*<sup>246</sup> Even the MPC, the most subjective of formulations, requires the defendant to provide a "reasonable explanation or excuse" for this lack of self-control.<sup>247</sup> If provocation is to be anything other than a special diminished capacity defense,<sup>248</sup> it must involve something more than the subjective

242. See MODEL PENAL CODE § 210.3 commentary at 61–63 (1985) (clarifying subjectivity of emotional distress standard).

243. See *id.* commentary at 62.

244. Although the MPC does not rely exclusively on this theory, it does not discourage it either. The Code itself provides that there must be "extreme" emotional distress or disturbance. See *id.* § 210.3; see also Michael & Wechsler, *Homicide II*, *supra* note 235, at 1281 (suggesting that reasonable person's "intensity" of feeling increases the "greater the provocation"). For applications of EED, see, e.g., *State v. Elliott*, 411 A.2d 3, 8 (Conn. 1979) ("To be 'extreme' the disturbance had to be excessive and violent in its effect upon the individual driven to kill under it."), and *People v. Patterson*, 347 N.E.2d 898, 901 (N.Y. 1976) (noting that lower court's conclusion that "extreme" emotion required by MPC precludes "mere annoyance or unhappiness or anger"), *aff'd sub nom. Patterson v. New York*, 432 U.S. 197 (1977).

245. See, e.g., *People v. Shelton*, 385 N.Y.S.2d 708, 717 (Sup. Ct. 1976) (emphasizing exposure to "extremely unusual and overwhelming stress" and "extreme" reaction to that stress, resulting in "intense feelings" that overpower self-control and reason).

246. "It has never been a *sufficient*, as opposed to a necessary, condition of mitigation that defendant satisfy the excusatory element, by proving simply that they killed in anger." HORDER, *supra* note 44, at 111.

247. MODEL PENAL CODE § 210.3; see also KENT GREENAWALT, *LAW & OBJECTIVITY* 119 (1992) (noting that "the phrase 'reasonable explanation or excuse' envisions some moral judgment by the jurors about defendant's culpability").

248. A diminished capacity defense is premised on the theory that the defendant, because of a mental disturbance not amounting to insanity, is less culpable than an intentional killer. It is "entirely subjective" in character. See MODEL PENAL CODE § 210.3 commentary at 71. Most states have, however, refused to find the MPC's EED defense indistinguishable from a diminished capacity defense. See, e.g., McClellan

mental state of the defendant. Indeed, this is precisely what the MPC tells us: that the provocation defense requires a showing that the defendant's loss of self-control was in some sense "reasonable" in the context of the "situation."<sup>249</sup>

## 2. *The Situation Did It*

Professor Wechsler's argument for reform assumed that the situation, rather than the man, was the culprit.<sup>250</sup> He urged that the extremity and unusualness of the situation demanded compassion, an argument that strongly influenced Code drafters.<sup>251</sup> Whether in the form of a causal claim<sup>252</sup> or in the form of excuse,<sup>253</sup> this argument's focus on the "extraordinary character of the situation"<sup>254</sup> sits uneasily when it comes to intimate homicide. Divorce and separation are all too common in the United States today.<sup>255</sup> Of course, in a particular individual's life, the event may be unusual, but the point of the situational argument is not to differentiate the situation from others in the defendant's life but to differentiate this defendant's situation from the situations of others that we deem "normal."<sup>256</sup> Since most persons who are divorced, and probably most persons who discover adultery, do not kill, it is difficult to see how the situation could be designated as "extraordinary" unless that designation reflects a choice rather than a description, a choice to see some situations as less deserving of punishment than others. In this sense, the situational argument does not answer the normative question,<sup>257</sup> it simply

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v. Commonwealth, 715 S.W.2d 464, 468 (Ky. 1986) (rejecting idea that MPC's EED defense is based on lesser form of insanity and disapproving earlier opinions suggesting that MPC formulation should be equated with diminished capacity defense).

249. MODEL PENAL CODE § 210.3 commentary at 62.

250. See Michael & Wechsler, *Homicide II*, *supra* note 235, at 1280 ("By provocation we mean the power possessed by some kind of things and events external to human beings, of arousing in them desires by which they are moved to particular acts."); *id.* at 1281 (noting that greater the passion, more likely are we to attribute "lack of self-control" to "the extraordinary character of the situation").

251. See MODEL PENAL CODE § 210.3 commentary at 62.

252. See Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091 (1985) (discussing causal theory generally).

253. See Dressler, *Reflections*, *supra* note 24, at 745-46 (stressing that MPC provocation defense is classic "excuse").

254. See Michael & Wechsler, *Homicide II*, *supra* note 235, at 1281.

255. There were approximately 1,215,000 American divorces in 1992. See STATISTICAL ABSTRACT OF THE UNITED STATES 105 (1994).

256. See Michael & Wechsler, *Homicide II*, *supra* note 235, at 1281 ("[T]he point is that the more strongly [most men] would be moved to kill by [such] circumstances . . . the less does his succumbing serve to differentiate his character from theirs.").

257. The normative character of the inquiry is clear from Hart's work. He states that it is cruel to punish one who lacks self-control because such individuals do not have a "fair opportunity to choose between keeping the law . . . or paying the penalty." HART, *supra* note 33, at 23 (emphasis omitted). If this is so, the provocation defense cannot be fully explained without also explaining the "fairness" of certain kinds of situations from the unfairness of others. Hart himself suggests the normativity of the inquiry by stating that the loss of self-control required is one in which conformity to the law is "a matter of special difficulty . . . as compared with *normal persons normally placed*." *Id.* at 15 (emphasis added); see also *id.* at 153 (describing provoked defendants as those for whom self-control is "*abnormal[ly]* difficult")

shifts that question to the environment.

### 3. *Let the Jury Decide*

Ultimately, the Code offers an institutional solution: It tells us that the jury should decide whether the situation merits compassion.<sup>258</sup> Again, this simply evades, rather than answers, the lurking normative questions. Arguing that juries "should decide" tells us nothing about which cases "should" go to juries. The very act of sending a case to a jury requires some kind of normative judgment, some choice about those cases in which a rational jury could find a "reasonable" explanation for rage. The institutional argument, however, gives us little clue about which cases satisfy that minimal test of rationality. Nor does it tell us much about how juries are to make their normative decisions. Jurors are told to put themselves in the defendant's position, to adopt his or her perspective and, yet, at the same time, to be "reasonable." They are asked to exercise independent "moral judgment,"<sup>259</sup> and, at the same time, adopt the defendant's vantage point.<sup>260</sup> In practice, this has done little to resolve the problem and much to confound judges and jurors.<sup>261</sup> After days of deliberation in a case in which a defendant killed a man who had parked in his parking place,<sup>262</sup> one jury summed up its confusion about the EED defense by sending a note to the judge, asking, *Whose norms apply, his or ours?*<sup>263</sup>

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(emphasis added).

258. See MODEL PENAL CODE § 210.3 commentary at 61 (1985) ("[I]t is for the trier of fact to decide, in light of all the circumstances of the case, whether there exists a reasonable explanation or excuse for the actor's mental condition.").

259. GREENAWALT, *supra* note 247, at 119 ("[R]easonable explanation or excuse' envisions some moral judgment by the jurors about defendant's culpability.").

260. The impulse here is natural. MPC drafters were worried that if they simply asked jurors to be "reasonable people" that jurors would automatically reject the defense since "reasonable people" do not kill. See, e.g., Tentative Draft, *supra* note 49, at 47 ("[T]he reasonable man quite plainly does not kill."); Michael & Wechsler, *Homicide II*, *supra* note 235, at 1281 ("[M]ost men do not kill on even the gravest provocation . . ."). The MPC answer to this is to separate the killing from the emotion and to maintain that the question is not whether a reasonable person kills but whether a reasonable person would experience the kind of emotion that might lead to a murderous rage. See MODEL PENAL CODE § 210.3 commentary at 60–62; Michael & Wechsler, *Homicide II*, *supra* note 235, at 1281.

Separating the person and his emotions from the act is consistent with the liberal focus on excuse, but it has also led scholars to focus almost exclusively on how we characterize the person. Today, the most pervasive questions raised about the provocation defense depend on whether a reasonable person bears such characteristics as impotence, disability, or terrorist upbringings. See FLETCHER, *supra* note 25, § 4.2.1, at 247–48; Kelman, *supra* note 64, at 636–37. In this world, Professor Dan-Cohen is surely right to conclude that the provocation question has become more than a question about emotion or situation, but about how we define the "self." See Meir Dan-Cohen, *Responsibility and the Boundaries of Self*, 105 HARV. L. REV. 959 (1992).

261. When confronted with Wechsler's plea that the jury is "asked to show whatever empathy it can," one court replied that Wechsler's statement "may explain the rationale of the draftsmen but . . . ignore[s] the realities of the courtroom." *State v. Elliott*, 411 A.2d 3, 7–8 (Conn. 1979) (quoting Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1446 (1968)).

262. See *State v. Raguseo*, 622 A.2d 519, 522–23 (Conn. 1993).

263. See *id.* at 526 ("[T]he jury sought reinstruction again on extreme emotional disturbance, requesting that the trial court focus on . . . whose norm is relevant, society's or the defendant's . . .").

#### 4. *Dangerousness and Deterrence*

The classic utilitarian arguments about dangerousness and deterrence<sup>264</sup> do little better in answering the normative questions the defense poses. Take the claim that a more severe penalty is unlikely to deter defendants who lack self-control. The obvious rejoinder is that this explains too much, that almost all criminal behavior is impulsive.<sup>265</sup> If lack of self-control means that we should partially excuse, we are going to be excusing the man who impulsively kills a gas station attendant as well as the man who impulsively kills his wife.<sup>266</sup> Both intended to commit the crime but neither controlled their impulses.<sup>267</sup> If we are confident that the gas station killer is deterrable while the wife killer is not, it is because we implicitly distinguish the cases. We tell ourselves that, in the one case, the defendant was "really" upset; that the adultery "situation" was more likely to make a reasonable person upset; that the jury should decide whether similarly situated defendants might have been deterred. In short, we are back at square one. Once we are prepared to look at the circumstances of individual cases, the deterrence argument quickly searches out the very same normative criteria that we are trying to identify.

The dangerousness variation on this argument fares no better on this score. There is no reason to believe that spouse killers, as a class, pose little risk of further antisocial behavior. Recent data from the Justice Department shows that seventy percent of husbands who kill their wives and twenty-seven percent of wives who kill their husbands had a prior arrest or conviction.<sup>268</sup> Although many believe that recidivism is unlikely in these circumstances, there are well-known examples of defendants who manage to find the same situation again and kill.<sup>269</sup> In *People v. Stanley*,<sup>270</sup> the defendant threatened to kill his first

264. On the utilitarian theory of excuse, see generally FLETCHER, *supra* note 25, § 10.3.5, at 813–17.

265. On the limits of deterrence, see HART, *supra* note 33, at 50 ("Human beings in the main do what the law requires without first choosing between the advantage and the cost of disobeying, and when they obey it is not usually from fear of the sanction.").

266. See Williams, *supra* note 64, at 742 ("[I]t is a curious confession of failure on the part of the law to suppose that, notwithstanding the possibility of heavy punishment, an ordinary person will commit it. If the assertion were correct, it would raise serious doubts whether the offence should continue to be punished.").

267. EED does not negate intent. See, e.g., *State v. D'Antuono*, 441 A.2d 846, 849 (Conn. 1982) ("Extreme emotional disturbance does not negate intent."); *State v. Gaynor*, 880 P.2d 947, 951 (Or. Ct. App. 1994) ("To the extent that defendant suggests that evidence of his EED negates the state's evidence of intentional conduct, he is wrong.").

268. See LANGAN & DAWSON, *supra* note 66, at 21 tbl.35. In 51% of the cases in which wives killed, the victim had a prior arrest or conviction. See *id.*; cf. BRIAN A. REAVES & PHENY Z. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1992 (1995) (reporting that among all defendants charged with murder in 75 largest counties of United States, 56% had felony arrest record and 47% had prior conviction for misdemeanor or felony).

269. In *Garcia v. Superior Court*, 789 P.2d 960 (Cal. 1990), the defendant, while on parole for the murder of his first wife, began to live with another woman. When that woman left, he killed her. See *id.* at 962–63. In *People v. Pickett*, 210 Cal. Rptr. 85 (Ct. App. 1985), the defendant, who had previously been convicted of strangling his first wife, was tried for the murder of his second wife. See *id.* at 86–87.

270. 897 P.2d 481 (Cal. 1995), *cert. denied*, 116 S. Ct. 1825 (1996).



wife, he was on parole for the murder of his second wife, and his third wife had mysteriously disappeared, when he killed his fourth wife.<sup>271</sup> In *Minnesota v. Phelps*,<sup>272</sup> the defendant hired a gunman to kill his wife and the hired killer went on to kill his own girlfriend, pleading guilty to manslaughter for the girlfriend's death.<sup>273</sup> There are also well-known examples of defendants who clearly "use the situation," who rely upon the heat of passion defense to rationalize their decision to kill. In more than one case, defendants have admitted that they were willing to serve the "five to seven" years "to get rid of" a partner<sup>274</sup> or to eliminate a rival.<sup>275</sup> In fact, defendants have, on occasion, expressed their confidence that they will be exonerated by claiming emotional instability.<sup>276</sup>

One need not believe that all partner killers are likely to repeat their offense or that all partner killers find emotional reassurance in the provocation defense, to believe that some do. The dangerousness argument, however, neither permits exceptions nor allows case by case inquiries. It assumes that all similarly situated spouse killers are, by definition, less dangerous than other killers. In the end, to accept the dangerousness argument is to find ourselves back where we began, with the MPC drafters' claims that these defendants are less dangerous because the situation caused the crime or because the defendant was uncharacteristically upset. Like the deterrence argument, the dangerousness claim rejects individualized assessments in favor of stock normative judgments clothed in questionable empirical garb.

## B. *Murder Law's Silent Demands of Loyalty*

To students of the provocation defense, it will hardly come as news that the MPC's reforms aspire to normative agnosticism.<sup>277</sup> Nor will it come as a surprise that this creates the potential for normative conflict: Even drafters

271. See *id.* at 503 & n.15.

272. 328 N.W.2d 136 (Minn. 1982).

273. In *Phelps*, the defendant hired his wife's brother, Wolfe, to kill defendant's wife (Vicky). Wolfe subsequently killed his girlfriend (Kim) when she became engaged to another man. Wolfe pled guilty to manslaughter for Kim's death and received immunity for the killing of Vicky in exchange for his testimony against defendant who was convicted of first degree murder of Vicky. See *id.* at 137-38. Phelps's request for a heat of passion manslaughter instruction was denied.

274. See *People v. Kozel*, 184 Cal. Rptr. 208, 213 (Ct. App. 1982).

275. In *People v. Thompkins*, 240 Cal. Rptr. 516 (Ct. App. 1987), the defendant became upset when his wife filed for divorce. He believed that she was "seeing someone else" and told a friend that he might have to "take him out." The friend tried to dissuade him from this course of action but defendant persisted "saying he was willing to 'do seven years for taking them out.'" *Id.* at 517.

276. See *Re v. State*, 540 A.2d 423, 429-30 (Del. 1988) (reporting testimony that defendant had told victim "one and one-half weeks" before her death, "'Don't leave me because if you do, I'll kill you'" and that when victim suggested that "he would go to jail," defendant was reported to have said "that he would just act like he was crazy and get off").

277. Although liberal theory justifies the defense in terms of self-control, scholars readily acknowledge the lurking normative questions. See FLETCHER, *supra* note 25, § 4.2.1, at 243-49 (emphasizing normative issues); Dan-Cohen, *supra* note 260, at 993-96 (noting temptation to evade normative issues).

of the MPC knew that if what the Code terms “the situation”<sup>278</sup> is defined to include a defendant’s idiosyncratic norms, the provocation defense will by definition produce normative conflict.<sup>279</sup> This is the obvious lesson of those hypotheticals in casebooks about defendants who adopt the moral code of terrorists,<sup>280</sup> and the vast commentary about the “characteristics” of the reasonable provoked killer.<sup>281</sup> What has yet to be appreciated, however, is how far-reaching this problem is in real life—how this conflict takes place regularly, among the cases we know as intimate homicide—and, more importantly, how it is tied to more basic intellectual habits nurtured by law reform.

### 1. *The Relationship Within the Idiom of Emotion*

In reform states, no doctrine tells judges to focus on particular relationships; that sort of focus was the stuff of the common law’s adultery limitation.<sup>282</sup> When we look at the law in practice, however, we find a different story. Cases reaching juries in reform jurisdictions involve *certain kinds of relationships*. When, for example, a young man argues that he was grievously insulted by his friends, judges easily conclude that the man’s rage is irrational and refuse a jury instruction.<sup>283</sup> Similarly, when an employer has insulted a defendant, a judge will find it difficult to believe that such an insult could rationally lead to murderous violence; this defendant, too, will be denied a jury instruction.<sup>284</sup> Take away the intimacy of a relationship and passion’s

278. See MODEL PENAL CODE § 210.3 (1985) (“The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”).

279. See *id.* commentary at 62 (rejecting notion that defendant’s characteristics should include “idiosyncratic moral values”).

280. See, e.g., ROBINSON, *supra* note 25, at 619.

281. See, e.g., State v. Ott, 686 P.2d 1001 (Or. 1984) (addressing question whether peculiar personality characteristics of defendant should be included in “situation”); MODEL PENAL CODE § 210.3 commentary at 62–63 (discussing characteristics question generally); Dressler, *Reflections*, *supra* note 24, at 752–53 (same); see also Dan-Cohen, *supra* note 260, at 993–96 (discussing this issue in context of famous case of *Bedder v. Director of Pub. Prosecutions*, 2 All E.R. 801 (H.L. 1954)); *infra* text accompanying notes 404–12.

282. See *Rex v. Greening*, 3 K.B. 846, 849 (1913) (holding when there is no legal—i.e., marriage—relationship, defendant “has no such right to control” over his faithless lover); Dressler, *Provocation*, *supra* note 24, at 440 (noting traditional approach in which killing for unfaithfulness of wife yields manslaughter but killing for unfaithfulness of “lover or fiancé is murder[.]”).

283. See, e.g., *Frazier v. State*, 828 S.W.2d 838, 839 (Ark. 1992) (“The fact that one friend teases another is not a reasonable excuse for a state of emotional disturbance so great as to excuse killing.”); *Farr v. State*, No. CACR 94-1256, 1995 Ark. App. LEXIS 565, at \*5 (Ark. Ct. App. 1995) (“[E]ven if appellant’s irritation from being teased could somehow constitute extreme emotional disturbance, there was no proof that it was reasonable.”) (quoting *Frazier*, 828 S.W.2d at 839).

284. See, e.g., *Frazier*, 828 S.W.2d at 839 (holding that EED instruction was unnecessary in case in which defendant, male friend of victim, said “‘Ooh, Dana peed on hisself’” and defendant was “tired” of victim “‘messing with him’”); *Thompson v. Commonwealth*, 862 S.W.2d 871, 877 (Ky. 1993) (holding that instruction defining EED was not required in case where prison inmate at work farm killed his supervisor after he became upset that his supervisor had criticized him, because “being ‘upset’ and ‘uneasy’ does not constitute extreme emotional disturbance” as defined by court); see also *People v. Pride*, 833 P.2d 643, 676

“rationality” disappears. Return that same claim to intimacy, however, and the emotion becomes “rational” once again. An insult by a wife, ex-wife, girlfriend, or even a casual sex partner often constitutes precisely the “humiliation”<sup>285</sup> necessary for a court to believe that the emotion is sufficiently “rational” to send the case to a jury.<sup>286</sup>

Although reform may have jettisoned “relationship” as relevant legal doctrine, legal practice has never jettisoned “relationship” in constructing claims of passion. Instead, reform folded this idea into the concept of a “rational” emotion,<sup>287</sup> transforming judgments about the relationship into judgments of affect. We see this most clearly in departure cases. A defendant who claims rage because his friends “were leaving him out” will be told that his defense is irrational, that he cannot rightfully claim an EED instruction because the explanation for his rage is unreasonable.<sup>288</sup> Yet in reform jurisdictions, a defendant who kills because he was rejected by an intimate, because “she turned her back” after sex,<sup>289</sup> or because she moved the furniture out,<sup>290</sup> is entitled to plead his case to the jury. The provoking factor here may be quite the same: leaving and rejection. That, then, cannot be the reason why juries are entitled to reach different results. Courts see these cases differently because the *relationship* between the parties is different; because the relationship is, in some sense, “making” these emotions seem rational.

If Professor Wechsler seems momentarily vindicated, let me pause to emphasize the way in which “the situation” seems to make these judgments rational. Why is it that the same event, in two different contexts, yields such different judgments of “rationality”? Why are we given to say that the emotion is all out of proportion to the deed when friends, employers, or landlords leave

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(Cal. 1992) (holding in mixed jurisdiction, janitor’s written criticism of defendant’s work was “insufficient” provocation).

285. See *People v. White*, 590 N.E.2d 236 (N.Y. 1992) (“The fact that defendant had been repeatedly humiliated by [his wife] was sufficient to establish the requisite provocation.”).

286. See, e.g., *People v. Moye*, 658 N.E.2d 232 (N.Y. 1985) (reporting that defendant was insulted by woman with whom he was trying to have sex and reversing for failure to instruct on EED); *People v. Benedict*, 609 N.Y.S.2d 100, 101 (App. Div. 1994) (reporting that jury heard EED claim based on argument in which an insult by victim “made him so angry” that “he lost control of himself”).

287. I use the term “rational” emotion here as shorthand for the determination by a judge that the case should go to the jury, i.e., that a “rational jury” could conclude that there was a “reasonable explanation or excuse.” See MODEL PENAL CODE § 210.3 (1985).

288. See *State v. Russo*, 734 P.2d 156, 160 (Haw. 1987) (holding that defendant presented no “reasonable” explanation or excuse” by arguing that he murdered friends who were “leaving [him] out” of their activities); see also *Cecil v. Commonwealth*, 888 S.W.2d 669, 671 (Ky. 1994) (holding that no instruction on EED available in case in which female defendant became “emotionally dependent” on her friend and increasingly “jealous” of time friend spent away from her).

289. *People v. Wood*, 568 N.Y.S.2d 651, 652 (App. Div. 1991) (“At his second trial, the defendant’s defense was that he had ‘snapped’ and was ‘totally out of control’ at the time of the killing” because of EED “triggered by his dissatisfaction with the victim who reportedly turned her back on him and went to sleep after they engaged in sexual intercourse”).

290. See *State v. Reams*, 616 P.2d 498 (Or. Ct. App. 1980) (reporting that defendant’s wife moved furniture out of house and that defendant relied on EED defense), *aff’d in part and remanded*, 636 P.2d 913 (Or. 1981).

or reject us,<sup>291</sup> while the same acts, with the same relation to the crime, may seem "rational" in the context of an intimate relationship? The MPC drafters would tell us that this is life—that it is the "situation" that makes some claims of emotion appear "rational" while others are not. But what kind of judgments are these? They are not necessarily judgments of fact. We can easily imagine cases in which the betrayal of a lifelong friend falls far more heavily on our emotional scales than an ex-boyfriend's new affections. Judgments of rationality in these cases are not attempts to obtain "full information" about actual emotional reactions. Instead, they express commitments to apply certain generalizations about intimacy, whether or not the facts support such generalizations.<sup>292</sup> In other words, our judgments of rationality express commitments to a norm rather than an actual description;<sup>293</sup> they ask us to assume the existence of legitimate emotional ties even in the face of facts suggesting quite the contrary. And in that commitment, they "steer understanding and observation" away from any other reconstruction but the one that we have assumed.<sup>294</sup>

## 2. *The Claims of Loyalty Implicit in "the Situation"*

We can see the normative character of these judgments more clearly if we remember some of the cases described earlier. Would a court ever find that it was "rational" to become enraged by a stranger who "turned her back" in an elevator? That witnessing a dancing competition could rationally inspire rage? The acts themselves are perfectly innocuous.<sup>295</sup> They are not the problem; it

291. See *State v. Wilbanks*, No. C9-90-2430, 1991 WL 171989, at \*2 (Minn. Ct. App. Sept. 10, 1991) (expressing skepticism about "rational basis" of claim that defendant acted in heat of passion because "the prospect of eviction drove [him] over the edge").

292. Frederick Schauer would describe this as an "entrenched generalization." For example, if a "No dogs allowed" rule were applied to ban a seeing eye dog, the generalization underlying the rule (dogs are badly behaved and create disturbances) would be "entrenched": It would apply "even in those cases in which that generalization failed to serve [the rule's] underlying justification." FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 48–49 (1991) (emphasis omitted). Applying the generalization in this way transforms it, in my view, from a description to a norm.

293. See ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* 162 (1990) (describing use of term "rational" as commitment to norms that would permit act to be described as "rational").

294. As Frederick Schauer has observed:

[D]escriptive possibilities that may exist in theory are blocked in practice by the way in which existing generalizations steer understanding . . . . The generalizations channel our perceptions, making it difficult to jump the channels of existing apprehension. Insofar as available generalizations are entrenched, some descriptive options will never be seen, others will become substantially harder to express, and still others will become less understandable than they would have been had not certain generalizations been entrenched.

SCHAUER, *supra* note 292, at 44.

295. Often, when the defendant's claim is of such a nature, courts will be tempted to say that the defendant "indulged" his emotions, betraying that what they mean is that the defendant "should" have controlled them. See HORDER, *supra* note 44, at 97–99 (discussing early analogue of this view based on "weakness of will").

is that these acts take place within a context which gives them a *certain meaning*—and that context plus its meaning generate claims of plausible emotion. It is only when we give turning and dancing and dating the meaning of “rejection” that the defendant’s claim of emotion becomes “rational.”<sup>296</sup> That intellectual move requires not only that there be some kind of relationship to reject, but also that the relationship generates meanings based on our expectations of intimacy. In other words, when we say that a situation plausibly evokes emotion, we do more than describe that situation, we commit to a world of meanings in which relationships demand particular kinds of loyalty.<sup>297</sup> More importantly, we commit to a world in which some violations of loyalty are offenses against that relationship.

That the relationship does the work of normativity here becomes even clearer when we consider the assumption of “lingering” emotion. Earlier, we saw courts assuming the “rationality” of extreme emotion based on past intimacy. The implicit argument was that these defendants had been wrongfully deserted. We know, however, that relationships may end for many different kinds of reasons—not only because the victim deserts a grieving partner but also because both parties want the relationship to end or because the defendant’s own bad acts have caused the departure. There is no necessary connection between lingering emotions and the simple fact that the partners have gone their separate ways. Our sympathy for lingering emotions betrays more than the end of the relationship; it betrays an implicit judgment that the departure reflected betrayal, desertion, or abandonment. If we were to believe that the defendant’s own wrongful acts caused the departure, we would not describe the case as one of “lingering feelings” even though the defendant may well have had such emotions. What makes the defendant’s claim rationally productive of emotion is not the fact of a prior relationship alone, nor the leaving itself, but a set of *meanings about relationships* in which it is wrong to leave, in which leaving breaches a covenant implicit in the relationship. This is why some courts are quick to drop judgments of “rational” emotion when they discover acts that challenge the assumed equities, when they find out that the defendant battered his wife, abused her children, or that the claimed infidelity was the defendant’s own.<sup>298</sup> In these circumstances, the defendant’s

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296. See, e.g., *People v. Fediuk*, 480 N.Y.S.2d 913, 914–15 (App. Div. 1984) (Weinstein, J., dissenting) (describing separation as rejection), *aff’d*, 489 N.E.2d 732 (N.Y. 1985).

297. See, e.g., GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 7 (1993) (“[T]he question of loyalty does not arise in the abstract but only in the context of particular relationships. Further, by definition, these ties generate *partialities* in loyalties, loves and hates, dispositions to trust and distrust.”).

298. See, e.g., *People v. Rivera*, 507 N.Y.S.2d 266, 267 (App. Div. 1986) (upholding trial court’s rejection of EED on basis that defendant’s relationship “with his estranged wife was plagued by constant strife, as evidenced by their periodic separations, and was punctuated by sporadic instances of physical abuse by the defendant”) (emphasis added); see also *State v. Traficonda*, 612 A.2d 45 (Conn. 1992) (affirming jury’s rejection of EED defense based on defendant’s own battering); *Fediuk*, 489 N.E.2d 732 (rejecting EED defense over dissenting opinion below in case where victim was trying to leave and had

rage no longer seems rational because the relational equities have changed.

Stepping back for a moment, we can see how reform has, once again, used the "rationality" of emotion to do just what it pretends not to do. We have already seen how the idea of relationship folds into the question of "rational" emotion. Here we see how the concept of rationality is transformed into judgments about those relationships. When reformers rid the law of the nineteenth-century categories, they believed they were ridding us of a long-outdated code of honor. When they declined to judge the adequacy of provocation, they rejected an approach that bestowed privileges on certain relationships. But getting rid of the categories, and forcing normative judgments on juries, did not prevent courts from deciding normative questions. It simply disguised these judgments by changing the ways we argued about them. It transformed them into questions that did not seem normative at all, into questions about situations or emotions or the defendant's characteristics.<sup>299</sup>

All of this is a rather abstract way of saying something simple and intuitive. In the end, our judgments about "passion" turn on the equities of intimacy and loyalty. Defendants regularly portray their partners as the wrongdoers in the relationship, as the cheaters who heartlessly left. Under the old law, however, defendants were limited to a particular "wrong," namely adultery. By rejecting the adultery limitation, reform has made way for a far broader set of equitable claims, claims about messy houses, child visitation, and moving the furniture.<sup>300</sup> If this is the direction of reform, we can begin to see why the defense, in MPC form, has proven troubling. After all, is a murder trial really a place to adjudicate a relationship? Should murder trials become a species of "divorce court" in which juries are asked to side with one party or another? Perhaps more importantly, should courts attempt such an adjudication when one of the parties is unavailable to tell her side of the story? Aren't the risks too great that our assumptions about relationships will stand in for the story that would have been told?

The problem with reform's approach now becomes clear. Although reform opened cases up to claims about relational equities, it claimed that the law was

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stayed at battered women's shelter), *aff'g Fediuk*, 480 N.Y.S.2d 913. For the dissent below, see *Fediuk*, 480 N.Y.S.2d at 914-15 (Weinstein, J., dissenting) (arguing for reduction to manslaughter verdict).

299. Feminist theory posits, of course, that this kind of rhetorical transformation sits at the core of "liberal legalism." See, e.g., Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, reprinted in *CRITICAL LEGAL STUDIES* 56, 62 (Allan C. Hutchinson ed., 1989) (stating that liberal legalism "legitimizes itself by reflecting its view of existing society, a society it made and makes by so seeing it, and calling that view, and that relation, practical rationality").

300. See, e.g., *State v. Fair*, 496 A.2d 461, 462 (Conn. 1985) (reporting that defendant relied upon EED defense in case where defendant was upset because his ex-girlfriend moved and told him he would never see his son); *State v. Werman*, 388 N.W.2d 748, 749 (Minn. Ct. App. 1986) (reporting that jury was instructed on provocation in case where parties argued and argument included dispute about messy house); *State v. Reams*, 616 P.2d 498 (Or. Ct. App. 1980) (reporting defendant relied upon EED defense in case where defendant claimed he snapped when his wife moved furniture out), *aff'd in part and remanded*, 636 P.2d 913 (Or. 1981).

not considering the equities, that all it was doing was describing the situation of a reasonable person. Precisely because the equitable discussion occurs on the rhetorical rather than the doctrinal level, it has a way of creating unexamined and unexaminable inconsistencies. Consider a series of cases in New Hampshire. In January 1983, the New Hampshire Supreme Court decided a provocation case, *State v. Smith*,<sup>301</sup> in which it interpreted the state manslaughter statute to require that no "lawful" act could constitute the basis for a claim of "extreme emotional distress."<sup>302</sup> The court held that the defendant had no viable provocation claim because he argued that he was provoked to kill by a bouncer who acted lawfully in ousting the defendant from a local bar. With that holding, one might imagine that other lawful acts, such as departure or divorce, might fall outside the scope of the defense. Five months after the court's 1983 ruling in *Smith*, however, the court heard another case, *State v. Little*,<sup>303</sup> involving a man who killed his wife because she refused to reconcile. Although the court cited and discussed *Smith* in general terms, it never mentioned the idea that her "leaving" might be a lawful act (nor did it ask whether Little's claim was barred under *Smith*).<sup>304</sup> In the world of the *Little* case, the relationship and the implicit norms of loyalty that it silently imposes have become more "rational" than the law itself.<sup>305</sup>

This strategy, which simultaneously denies yet depends upon judgments of intimate loyalty, has allowed reform to cling to older notions of relationship otherwise discarded by law and society. Why else would the law encourage protective orders in domestic violence cases but hold that juries could find such orders good cause for murderous rages? How else are we to explain that divorce or departure, lawful acts, are assumed to spawn murderous rages that survive for months and years? How else are we to understand why the reformed defense, unlike almost any other in the criminal code, shows compassion to defendants who have created the conditions of their own defense, who respond to what would otherwise seem trivial slights, or who use violence to punish lawful acts? Because the relationship supplies the norms that the criminal law denies. Because, in denying its normativity, the law of passion may practice normativity free of critical judgment.

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301. 455 A.2d 1041 (N.H. 1983).

302. *See id.* at 1043 ("[W]e hold that a lawful act cannot provide sufficient provocation to support a finding of manslaughter.").

303. 462 A.2d 117 (N.H. 1983). The trial judge had given the jury a manslaughter instruction even though the provoking situation involved the victim's attempt to end the relationship. *See id.* at 118.

304. *See id.* at 118-19 (discussing *Smith*, 455 A.2d 1041).

305. New Hampshire is not the only state in which this appears to have happened. In New Mexico, a non-MPC state, the supreme court ruled in *State v. Manus*, 597 P.2d 280 (N.M. 1979), that no lawful act may constitute provocation. *See id.* at 285. Later, in a departure case, the court made no mention of this point. Instead, it held that rejection did not amount to a "sudden quarrel" sufficient to give rise to adequate provocation. *See State v. Robinson*, 616 P.2d 406, 413 (N.M. 1980).

### C. *A Brief Response to the Unpersuaded*

There are those who will say that in any contest of claims between the defendant and the victim, we should resolve uncertainty in favor of the defendant, that we should stifle any doubts we have about the defendant's claims to protect his freedom. My argument does not seek to pit the defendant's autonomy claims against the victim's. What this Part has tried to show is that reform protects something more than the defendant's freedom. Reform's focus on self-control means that the defendant not only has a right to choose, but also to judge. It is ironic but true that a defense that has been touted as the most "behaviorist" of provocation formulas does just what all the older formulas do: It simply disguises what it is doing in the form of ideas about rational emotion. In the end, advocates of reform must not only defend reform in terms of Hart's "freely choosing self," they must grapple with whether the "freely choosing self" also includes judgments about how we relate to those with whom we are most intimate.

Some may insist that I have simply taken the victim's point of view, but this is far too glib a response. As I try to show later,<sup>306</sup> the divide between those who support, and those who seek to abolish, this defense reflects deep conceptual disagreements. More importantly, I doubt whether this claim would be made in other cases. Would scholars say that the law of self-defense takes the "victim's side" when it requires that the triggering violence was unlawful, or when it requires a showing of proportionate violence?<sup>307</sup> Would scholars say that the law of duress or imperfect self-defense takes the "victim's side" when it bars claims for defendants who intentionally create the conditions of their own defense?<sup>308</sup> To the extent that the provocation defense departs from these principles and yields results contrary to our intuitions about criminal culpability, my argument is precisely the opposite of a claim that is partial to the victim. Instead, it is an argument that proceeds from existing criminal law theory and practice.

Others will insist that I have wrongly discounted the role of emotion in intimate relationships. I mean no disrespect to emotion; indeed, as I argue later, I believe that current behavioral theory falsely subordinates emotion when, in fact, both science and law tell us that emotion may be essential to reason.<sup>309</sup> I do, however, take a different view of emotion than reform's

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306. See *infra* Part III (arguing that differences between feminists and reform's defenders depends upon excuse).

307. See MODEL PENAL CODE § 3.04 (1985) (providing that deadly force must be proportional); see *supra* note 20 (identifying other defenses with proportionality requirements).

308. See MODEL PENAL CODE §§ 2.09(2), 3.04(2)(b)(i), 3.09.

309. See *infra* Part IV (arguing against abolition position because law needs to protect emotion as essential to our attachment to law itself).



defenders. There is no question in my mind that heightened emotions may distort our judgments.<sup>310</sup> But the reverse is also true: The more one feels "justified" or "vindicated," the greater the intensity of the emotion. When we change our judgments, our emotions and our actions often follow suit.<sup>311</sup> This dual aspect of emotion is ignored by arguments that assume spouse killers are incapable of controlling their emotions or actions. Good evidence suggests that many persons in these defendants' situations also feel extreme emotion, but do not act upon these emotions: There are the hundreds of thousands of persons who get divorced or separated every year who do not kill. The problem is not simply heightened emotion, it is that emotion reflects and reinforces judgments for which liberal behavioral theories provide no account.

Students of the provocation defense may put this argument in the language of excuse and justification, and claim that I have wrongly transformed a defense that focuses on state of mind as partial excuse into one that evaluates the defendant's conduct as partial justification.<sup>312</sup> As I argue later, I believe that the defense is most definitely an excuse, although not in the traditional understanding of that term.<sup>313</sup> At a more fundamental level, however, this argument misses the point. Whatever one believes about the nature of emotion in the abstract, any satisfying theory must deal with the *practice* of the defense, a practice that is distinctively normative. In assessing emotion, courts have consulted neither "quickened heart-beats nor . . . shallow breathing, . . . trembling lips nor . . . weakened limbs."<sup>314</sup> They have looked to cultural ideas of "rational emotion," a practice that assumes much about the loyalties created by intimacy.<sup>315</sup> To argue that the defense has been improperly practiced as partial justification, when it should have been partial excuse, does nothing to undermine my claim. Defenders of such a theory must simply

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310. See *id.* (arguing that sincere emotion may be relevant to sentencing or grade of offense).

311. See ROBERT C. SOLOMON, *THE PASSIONS: EMOTIONS AND THE MEANING OF LIFE* 187 (1976).

312. See, e.g., Dressler, *Reflections*, *supra* note 24, at 746 n.107 (arguing that MPC's provocation formula is clearly based on concept of "excuse"). An "excuse" is a defense that adjudges the defendant less culpable, typically because of the defendant's state of mind (e.g., insanity); a "justification" is a defense that adjudges the defendant less culpable because his acts, all things considered, were the right things to do in the circumstances (e.g., necessity). This division is a rough approximation, not a rule. See generally Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984) (arguing that Anglo-American criminal law should not attempt to distinguish systematically between justification and excuse).

313. See *infra* Part IV.

314. 2 JAMES, *supra* note 16, at 452 (espousing physicalist view of emotion). There is some evidence that learning of infidelity increases male, but not female, heart rates by up to five beats a minute (the apparent equivalent of a jolt of three cups of coffee). See Buss, *supra* note 84, at 543 (reporting results from experiment). This, of course, does not explain why we should not want to partially excuse the use of violence in response to such emotional "jolts." A "behavioral" model would not only have to explain the emotional reaction, but also the physical or behavioral compulsion or quasi-compulsion to use violence in response to the three-cups-of-coffee reaction.

315. See *supra* Subsection II.B.2.

explain its practice or provide an alternative means of making the defense practice as excuse.<sup>316</sup>

Finally, one might argue that the conflicts I emphasize are inevitable and thus merit no change in the defense. As Professor Meir Dan-Cohen has so insightfully shown, the criminal law speaks with two, often inconsistent, voices—with one voice that tells us all to conform our conduct to the law (“conduct rules”) and with another voice that tells judges to make exceptions for particular cases (“decision rules”).<sup>317</sup> In this instance, however, we have moved beyond the conflict between conduct rule and decision rule. Here the conflict is within the defense itself,<sup>318</sup> between the conduct rule the defense implicitly creates and other laws and commitments, outside the criminal law in family law and civil law.<sup>319</sup> In this sense, the passion defense is far from representative of other defenses. Indeed, it is virtually alone: It creates conflicts between the private and public use of violence that have no analogue in the law of self-defense, necessity, or duress.<sup>320</sup>

My argument should not be confused with the position that relationships involve no special claims of loyalty or fidelity (they do) or that individuals are not, in part, defined by their relationships (they are). But if these are the important questions, they are ones that the liberal theory of self-control cannot answer. Although law reform makes choices about what claims of loyalty it will honor, it denies that it is making these choices. It wraps these questions up in other ideas: the rationality of the emotion, the situation, or the characteristics of the defendant. As a result, it honors loyalties based on a single sexual act as easily as those based on twenty years of marriage, and it punishes disloyalty in the “turning [of] one’s back”<sup>321</sup> as easily as deliberate fraud.

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316. In theory, the defense could be practiced as an excuse if it operated as a diminished capacity defense. One might define, for example, a “reasonable excuse or explanation” as a mental disorder. Some courts have seemed to approach, but have ultimately refused to embrace, such a formulation. *See, e.g., State v. Dumlao*, 715 P.2d 822, 829–31 (Haw. Ct. App. 1986) (suggesting that MPC’s EED defense is partial diminished capacity defense).

317. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 625 (1984) (arguing that separation between decision and conduct rules presents inherent conflicts in criminal law).

318. An example may help to see this distinction: The provocation defense applied in a murder case creates a conflict between what Professor Dan-Cohen sees as a conduct rule (the rule against murder) and a decision rule (the rule of provocation). *See id.* at 626–27 (describing and defining decision versus conduct rules). But the defense itself incorporates an unacknowledged conduct rule (as I have construed it) relative to the provoking behavior that is a condition of the defense. That conflict is one within the defense, not between the defense as decision rule and offense as conduct rule.

319. As Professor Dan-Cohen notes, selective transmission may operate illegitimately in precisely those cases in which the law uses the distinction between conduct rules and decision rules to achieve something that it could not otherwise achieve. *See id.* at 665 n.110.

320. By this I mean that these defenses are typically unavailable if the acts triggering the defendant’s claims are lawful.

321. *People v. Wood*, 568 N.Y.S.2d 651, 652 (App. Div. 1991).

## III. PASSION PERSONIFIED

For some time, feminists have raised concerns about the heat of passion defense, arguing that its history and impact reveal gender bias.<sup>322</sup> Although occasionally acknowledged, these claims have sparked no major judicial or academic revision in the theory or practice of the defense. Indeed, the practice has remained remarkably consistent despite these challenges. This reflects a familiar misunderstanding: Liberals tend to hear the claims of feminists as “political” charges. Feminists, on the other hand, tend to believe that liberals neither understand nor appreciate women’s “experience.” I think that the misunderstanding is more sophisticated, but far more understandable, than this standard account suggests. The conflict, as I see it, depends on criminal law’s theory of excuse and its assumptions, assumptions that feminists seek to challenge. In this Part, I argue that reform’s method, judged by any standard, whether feminist or not, forced the law of provocation to stand still in the face of changing social norms. I then examine the ways in which the liberal theory of this defense assumes precisely what feminists contest.

The history of the passion defense, from the common law to the Model Penal Code, is the history of a “passion” that is increasingly private and personal. Once an honor code, then heated blood, now a state of mind, the idea of passion has moved steadily inward. That move has fundamentally changed the shape of the defense. When honor ruled, courts imposed categories of wrongs defined by social relationships.<sup>323</sup> When passion became a natural force within the “blood,” all the important doctrinal limitations focused on when the blood could cool.<sup>324</sup> When passion became mental distress, our questions delved into the minds of ordinary persons to provide answers.<sup>325</sup> The Model Penal Code was the logical culmination of this shift. It took the “reasonable person” model a step further by asking juries not only to look into persons’ minds but also to identify their personality characteristics.<sup>326</sup> What had moved from norm to body to mind was now a question of *identity*.

By embracing this shift, MPC reformers never intended to endorse outdated norms about relationships. By eliminating the category of adultery and extending coverage to nontraditional relationships, reformers no doubt saw themselves as taking the progressive position on gender issues. What reformers did not envision, however, was that their intellectual method might betray their

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322. See Coker, *supra* note 57, at 75; Mahoney, *supra* note 4, at 79–80; Taylor, *supra* note 63, at 1689–92.

323. See HORDER, *supra* note 44, at 62–63.

324. As contemporary common law jurisdictions explain this formulation, the cooling off prohibition is the objective counterpart to the heat of passion requirement. See *Tripp v. State*, 374 A.2d 384, 391 (Md. Ct. Spec. App. 1977).

325. See, e.g., KADISH & SCHULHOFER, *supra* note 55, at 411–14 (explaining move toward reasonable person formulation).

326. See, e.g., MODEL PENAL CODE § 210.3 commentary at 62 (1985).

purpose. Internalizing the defense within the minds of reasonable defendants simply ignored the normative questions about relationships that remained. In a world in which social norms are changing, not taking a position becomes a position, one that endorses the status quo even as it denies that it is endorsing anything at all.

The shift from a normative defense to one based on identity is not simply a shift in doctrine or theory; it is a shift in intellectual method. It transforms the questions we ask of the defense. Once, we inquired whether the victim had done something wrong relative to the killer and our attention was correspondingly focused on the norms governing their relationship. While the norms embodied in that early modern defense are unrecognizable today, they were acknowledged as norms nonetheless.<sup>327</sup> The move inward, what I would call the "personification" of the defense, shifted that question inside the emotional life of one person. It takes normative questions (which passions the law *should* protect) and puts them, in answer form, into the minds of defendants. Now, the standard questions asked in provocation cases all focus on the emotional life of reasonable persons.

Given this approach, it should be no surprise that feminists have balked. Feminism is a normative enterprise. It asks how we should understand gender and what effects gender should have on the world.<sup>328</sup> To the extent that feminism asserts that women's experiences are different and valid,<sup>329</sup> it necessarily embraces a normative view challenging the existing order.<sup>330</sup> Hence, it is no wonder that advocates of the defense cannot engage feminist claims. The defense and its theory aspire to a world of "is" rather than "ought," to a world in which self-control is measured in degrees and emotion described as situation. This aspiration to descriptive neutrality means that normative challenges are likely to be rejected out of hand. For if one believes

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327. See HORDER, *supra* note 44, at 62–63 (noting that early modern law recognized passion as deliberate act of retaliatory anger, anger that depended upon judgments of "wrongdoing and of appropriate response").

328. See Case, *Of Richard Epstein*, *supra* note 30, at 370 (explaining that feminism "asks what, from a feminist perspective, is wrong with the world; how much does the law have to do with creating, reinforcing and meaning what is wrong; what would the ideal world look like; and how can law help us to get to that ideal").

329. One form of feminist argument proceeds to "uncover and claim as valid the experience of women." MacKinnon, *supra* note 299, at 57. To the extent that such an argument takes its normative authority solely from sex, it is often confused with a kind of victimology, an argument that gains authority by a "state of injury." See generally BROWN, *supra* note 29 (exploring how injury has become basis of political and legal identity). Although such claims have done much to jolt the debate, they also present problems. Cf. Martha L.A. Fineman, *Feminist Theory and Law*, 18 HARV. J.L. & PUB. POL'Y 349, 356 (1995) (noting it is problematic to rely upon "mere presence of a characteristic or set of characteristics [that give] the individual . . . authority and legitimacy"). My effort here has not been to privilege the characteristic or quality of "sex" in any particular way. Instead, I use what I believe are rather conventional legal tools to demonstrate the ways in which legal discourse has made normative commitments regarding gender and, in particular, relationship as sex, impossible to see. This is not a simple claim that "neutrality" has led us here; it is an investigation into the intellectual habits of neutrality.

330. See MacKinnon, *supra* note 299, at 57 (observing that feminism "is creating a new process of theorizing and a new form of theory [in opposition to] male dominance[']s . . . paradigm of order").

that the only way to answer provocation's questions is by describing situations or persons or characteristics, a normative challenge will inevitably look, by comparison, as an effort to achieve "political" ends.

One does not have to be a feminist to see why the personification of the defense drove the law to a position that inadvertently protected older gender norms. R.M. Hare explained it well when he reminded us that, "standards only remain current when those who make judgments in accordance with them are quite sure that, whatever else they may be doing, they are evaluating (i.e., really seeking to guide conduct)."<sup>331</sup> To choose, one must believe that one is making a choice.<sup>332</sup> That, however, is precisely what Wechsler and Hart hoped to avoid, by sending cases to juries, seeking a scientific explanation of passion, and focusing our attention on the situation of the reasonable person.<sup>333</sup> Each of these strategies, and others, aimed to avoid choice by suggesting that all the difficult questions could be resolved by "observing" the situation or by "identifying" the defendant's personality characteristics. That intellectual strategy depends upon a false metaphor, the idea that we "see" answers to normative questions,<sup>334</sup> rather than commit to them.<sup>335</sup> As such, it assumes from a start a position that is both passive and historical, that simply imposes history upon the present.<sup>336</sup>

The problem, however, is more than passivity. Internalizing questions about provocation within the minds of reasonable persons assumes that the

331. R.M. HARE, *THE LANGUAGE OF MORALS* 147 (1972).

332. *See id.* at 127 ("When we commend or condemn anything, it is always in order, at least indirectly, to guide choices, our own or other people's, now or in the future.").

333. Unfortunately, many of the drafting choices made by reformers only intensified the degree to which the defense seemed not to be making judgments at all. Consider the MPC's rejection of the common law's specific categories. *See supra* text accompanying notes 48-49. Once one commits to an intellectual strategy of description, generality will actually worsen the law's passivity by obscuring relevant features of the normative inquiry. This is why common law jurisdictions with their more specific categories have an easier time addressing changing cultural norms: Although they may apply the categories mindlessly, their specificity actually focuses them on the idea of relationship. *See supra* text accompanying notes 190-91 (discussing how traditional states' focus on departure stems from adultery category). Similar effects can be seen in the MPC's choice to embrace the jury as the solution to the defense's normative problems. *See supra* note 258 and accompanying text. One may well decide, it seems to me, that juries are the appropriate place to debate normative conflict. To believe, however, that juries' decisions do away with normative decisions elsewhere in the system can only increase normative passivity. *See supra* text accompanying notes 258-59 (arguing that sending case to jury does not eliminate question about which cases should go to juries). If we believe that someone else is doing all the normative work, we will be tempted to think that we are doing none.

334. *See* GILBERT RYLE, *THE CONCEPT OF MIND* 303 (1949) (rejecting idea that theorizing is best understood "by analogies with seeing": "the prompt, effortless and correct visual recognition of what is familiar, expected and sunlit").

335. Norms, in my view, are commitments we make to each other. In this sense, the normative inquiry necessarily rejects passivity and requires engagement; it does not look backward, but forward.

336. My claim that one cannot locate answers to the provocation defense within attributes of persons is not an argument that norms do not exist or cannot be known. None of our most cherished legal commitments (e.g., freedom, justice, security) "exist" or are "knowable" in the observational sense of the term. Nor is it an argument that norms exist independent of fact or vice versa. One can quite readily accept that "no identifiable normative interpretation stands neatly separable from descriptive interpretation," GREENAWALT, *supra* note 247, at 75, and still conclude that observation and normative judgment entail identifiably different intellectual habits, *see id.* at 75-76.

proper focus of the inquiry is on persons. Relationships become relevant only to the extent that they can be described as a property of a person, a characteristic. There is nothing illogical about such an approach, but it leads to particular kinds of inquiries and answers. It is one thing to say, for example, that intimate relationships are so important to self-definition that we should deem persons who kill in intimate relationships to be less culpable. It is quite another to say that persons with particular characteristics are likely to lose self-control in these situations. The former statement invites rebuttal and argument on the societal judgment about intimate relationships. The latter inscribes an answer to the question the first asks—*it naturalizes within the minds of persons answers to the very questions we are struggling to answer*.<sup>337</sup>

With this understanding (which depends not a whit on feminist premises or method),<sup>338</sup> it should seem less of a surprise why feminists have argued repeatedly, and forcefully, that this defense asks questions about who the male “is” to define “gender,” i.e., relations between the sexes. Personifying the defense means that normative questions about relationship are transformed into questions about defendants (their minds, emotions and identity).<sup>339</sup> By describing the defendant and his personality characteristics, the law (consciously or not) provides answers to the underlying normative questions. If the defendants involved in these cases are largely male, it follows that the description of the defendant (who the “man” is) becomes the arbiter of the implicit normative question (how we should “relate” to each other). This is not a claim that the law tends to default, automatically, to the “male” position by either osmosis or intentional bias. It is a claim that the law’s technique, its personification of the defense, leads quite naturally to the feminist argument that the law asks questions about men to define gender.<sup>340</sup>

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337. This insight finds some resonance in the work of other scholars, albeit in different contexts and on different topics. See, e.g., George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 953 (1985) (arguing that idea of reasonable man packs into itself both extensions and limitations of relevant norms); Kelman, *supra* note 64, at 645–46 (arguing that character theories incorporate our judgments about appropriate behavior into character at very start).

338. I say this not because a feminist argument cannot or should not be made. Such arguments have been made. Here, however, I am trying to show why it is that liberals cannot see or appreciate the feminist argument.

339. This may explain why reform’s defenders could understand the potential for normative conflict in theory but fail to see it in practice. Conflict was only perceived when the defendant’s entire description amounted to a normative proposition, when the defendant was defined by his terrorist upbringing. See ROBINSON, *supra* note 25, at 619.

340. When feminists ask the descriptive question, they tend to find themselves facing similar circumstances. Consider, for example, the debate about the adoption of “reasonable woman” standards. As soon as courts began to adopt such standards, arguments quickly erupted within feminism over whether the standard was too “objective” because it left out other individual characteristics or whether, by including subgroups of women, the defense would become “oversubjectified.” See Fineman, *supra* note 329, at 360–65 (discussing this question in context of sexual harassment law). Here, feminists are simply borrowing the attributional logic of liberalism and having the same never-ending circular arguments about objectivity and subjectivity, rephrased as essentialism and difference. If feminism seeks to be normative, in my view, it must seek answers in relational understandings, not attributions.

In the end, feminists and liberals talk past each other because feminism seeks to contest fundamental assumptions upon which liberal theories of excuse depend. The liberal emphasis on self-control necessarily focuses on self and identity. Even those scholars who have sought to destabilize conventional theories of excuse retain this focus on self. Thus, Mark Kelman assails the time-bounded reasonable man with his artificially bounded personal characteristics<sup>341</sup> and Meir Dan-Cohen offers us, instead, an intriguing flexible self which expands and contracts to fit the situation.<sup>342</sup> This focus on self, however flexible or determined, is precisely what feminists contest. As Robin West so insightfully suggested some time ago, both liberal and critical theory assume that connection poses a threat to individual freedom.<sup>343</sup> If the measure of free will is freedom *from* relationship then, when emotional relationships get the better of us, we appear naturally less culpable. Relationship itself becomes a "natural" excuse.<sup>344</sup> From that perspective, it should not be surprising to see courts opine as if an intimate relationship were in and of itself a proper basis for a provocation claim.<sup>345</sup> Nor should it be surprising that feminists and liberals talk past each other, for if liberal theories begin from a position that ignores relationship, they begin from a position that makes gender both irrelevant and invisible.

Familiar disputes about rape and battering reflect this deeper theoretical impasse. The feminist position has emphasized the role of relationship in producing consent or suggesting the victim's desert (in other words, the role of relationship as excuse).<sup>346</sup> Catharine MacKinnon tells us that relationships like marriage or dating "contraindicate rape," or battering.<sup>347</sup> Susan Estrich reminds us that this is all tied to an idea of emotional entanglement that once seemed quite "natural," pointing us to cases in which judges explained that those who raped or battered their loved ones had let their feelings "'get out of hand.'"<sup>348</sup> Relationship is an excuse in precisely the same way as in

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341. See Kelman, *supra* note 64, at 633-37 (arguing that "broad and narrow" views of defendant dictate outcomes in variety of criminal law cases, including provocation cases).

342. See Dan-Cohen, *supra* note 260.

343. See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 1-3 (1988).

344. This view governs excuses that cover women as well as men. See Coughlin, *supra* note 28, at 26-43 (discussing traditional ideas of moral agency in context of understanding criminal law's approach toward moral agency of women).

345. See *People v. White*, 590 N.E.2d 236, 237 (N.Y. 1992) (stating "that defendant may have met his burden with respect to the first element of the [EED] defense by evidence of a violent and tumultuous relationship with his wife"); see also *State v. Marino*, 462 A.2d 1021, 1028 (Conn. 1983) (finding sufficient evidence to convict on EED manslaughter based on "the evidence of the relationship of the defendant to the victim, the quarrel which preceded the shooting and his distraught appearance").

346. See, e.g., SUSAN ESTRICH, REAL RAPE 4 (1987) ("[T]he law's abhorrence of the rapist in stranger cases . . . has been matched only by its distrust of the victim who claims to have been raped by a friend or neighbor or acquaintance."); Mahoney, *supra* note 4, at 61-63 (arguing against public assumption that continued physical presence of victim after pattern of abuse constitutes partial consent).

347. MacKinnon, *supra* note 299, at 64.

348. ESTRICH, *supra* note 346, at 103 (quoting *People v. Gauntlett*, 352 N.W.2d 310, 313 (Mich. Ct. App. 1984)).

provocation cases: a portrait of victimization by emotion. Defendants swept up by their feelings suddenly become less culpable of rape or battering in the same way that they are less culpable of killing. In each case, the feminist claim strikes most cunningly at the liberal premise: that relationships expressed as emotional entanglement necessarily excuse.

Looking back now, it is possible to see why a doctrine that easily fails the standards of a second-generation feminism<sup>349</sup> has remained safely intact. Feminists' arguments about this defense have fallen on deaf ears in large part because defenders of the EED formulation, or provocation in general, do not have an intellectual method that will permit them to engage a claim of gender bias. Without recognizing that there are normative commitments about relationships being made in the practice of the defense, there is no cause to evaluate those norms. Feminists ask: "How could the law possibly permit batterers to claim an excuse, even a partial one, based on their own battering?" Liberals ask: "Who is the defendant? Did he have the capacity for self-control? What were his personality characteristics in the situation?" With these inquiries firmly in place, the normative issue about relationship cannot be joined. Liberals ask who we are; feminists ask how we should relate to each other. It is no wonder that, in a world where feminists have declared victory on a number of issues,<sup>350</sup> feminist challenges here have resulted in no major changes in law or treatise or statute.

#### IV. TOWARD A NEW THEORY OF THE PASSION DEFENSE

My research prompts me to return to the grand old question of the provocation defense: Why do we partially excuse some defendants who kill even though we know that no "reasonable person" kills? My proposal seeks to reconstruct, rather than abolish, the defense. It will not satisfy everyone; like any other proposal, it is not immune from the vagaries of implementation and context. It cannot, in my view, be accomplished without corresponding changes in murder law, lest our reshaping of the provocation defense leave the criminal law rushing toward unmerited punishment. In the end, however, I believe that

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349. When I gave a version of this Article at a women's conference, one of the participants remarked that my argument depended upon a feminist approach identified with "second-generation" feminism, exposing a purportedly neutral law for all its nonneutrality, rather than relying on women's experience or other "third-generation" feminist analytic techniques. This comment poses the interesting question of why a legal standard that fails "easy" feminist arguments still exists or, even if the law has not changed, why this Article had never been written before. One could, I suppose, simply say that gender bias keeps the law and scholarship in place. What I have tried to show, however, is that given current assumptions about the theory of excuse, defenders of the EED defense do not have the intellectual equipment that permits them to *see* the law as biased. This says something more than that the law is nonneutral; it exposes the intellectual techniques that keep liberals and feminists talking past each other.

350. Cf. Martha Albertson Fineman, *Preface* to MARTHA ALBERTSON FINEMAN & ROXANNE MYKITIUK, *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* at xiii (1994) (noting successful feminist challenges in "war" to redefine role of women).



we can better address the conflicts I posed in Part I by developing a new theory of why we partially excuse in provocation cases, a theory that speaks explicitly to the *reasons* why defendants claim that they have killed.

### A. *Emotions and Reasons*

Advocates of abolition face an obvious question: If we abolish the defense, what becomes of the woman who, distraught and enraged, kills her stalker, her rapist, or her batterer?<sup>351</sup> I suspect that many would say that these women deserve our compassion. The most persuasive scholarly defenses of provocation have all invoked examples, like these, in which the defendant's emotion reflects the outrage of one responding to a grave wrong that the law otherwise punishes. Commentators frequently use examples of men killing their wives' rapists or children who kill abusive parents as clear cases of provoked murder.<sup>352</sup> When, for example, the MPC drafters sought to justify their expansion of the defense, they relied on a case involving forcible sodomy.<sup>353</sup>

The problem comes when we focus on cases in which the emotion is based on less compelling "reasons"—when women kill their departing husbands or men kill their complaining wives. Under conventional liberal theory, if extreme emotion is shown, these cases should be handled no differently from cases where victims kill their rapists and stalkers and batterers. The quantity or intensity of the emotion provides the excuse, not the *reasons* for the emotion. This focus on emotion, to the exclusion of reason, reflects a very important assumption made by liberal theories of the defense, that emotion obscures reason. When we distinguish the rapist killer from the departing wife killer, we acknowledge a very different view of emotion, one in which emotion is imbued with meaning. Both the departing wife killer and the rapist killer may be upset, but the meanings embodied in their claims for emotional understanding are quite different. In distinguishing these cases based on the reasons for the claimed emotion, we acknowledge a view of emotion in which emotion is not the enemy of reason but, instead, its embodiment.

Recently, in a wise and imaginative article, Professors Dan Kahan and Martha Nussbaum have argued that the criminal law's conventional behavioristic assumptions obscure the degree to which emotion reflects judgment.<sup>354</sup> Their view is neither idiosyncratic nor unscientific. In the past two decades, the idea of emotion as the natural enemy of reason has been

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351. See, e.g., *Commonwealth v. Stonehouse*, 555 A.2d 772 (Pa. 1989) (describing situation in which woman killed her former boyfriend who had stalked and harassed her and finding on appeal that she was entitled to assert provocation theory based on cumulative impact of earlier events). This assumes, of course, that there is some time lag between the rape and the killing, or the stalking and the killing; otherwise, the defendants would have perfect or imperfect self-defense claims.

352. See ROBINSON, *supra* note 52, § 102, at 479.

353. See MODEL PENAL CODE § 210.3 (1985) (citing *State v. Gounagias*, 153 P. 9 (Wash. 1915)).

354. See Kahan & Nussbaum, *supra* note 38, *passim*.

seriously questioned by brain scientists<sup>355</sup> and psychologists,<sup>356</sup> by rhetoricians<sup>357</sup> and philosophers,<sup>358</sup> by classicists<sup>359</sup> and even by legal scholars.<sup>360</sup> That both brain scientists and philosophers may now agree that emotion reflects or assists our reasoning processes tells us something that law, and life, already reflect. When we see that someone is angry, we do not call Mr. Wechsler's psychiatric expert for a diagnosis, we simply ask "why?" We expect reasons, and they are typically attributions of wrongdoing and blame. This intuition is reflected in almost all versions of the provocation defense. No form of the defense excuses, even partially, based on emotion alone. Even the MPC's version of the defense, the defense most devoted to behavioral explanation, nevertheless assumes that it is possible to have reasons for emotions.<sup>361</sup>

The traditional ideal of emotion as the lesser sister of reason not only mimics an external gender hierarchy by placing reason as the "master within,"<sup>362</sup> it obscures the degree to which *reason may need emotion*.<sup>363</sup>

355. See ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN at xii (1994) ("[E]motions and feelings may not be intruders in the bastion of reason at all: they may be enmeshed in its networks, for worse and for better."); see also W. Gerrod Parrott & Jay Schulkin, *Neuropsychology and the Cognitive Nature of Emotions*, 7 COGNITION & EMOTION 43, 56-57 (1993) (arguing that emotion and sensation cannot be independent of cognition). Thanks to Ann Althouse for introducing me to Damasio's fascinating book.

356. See, e.g., JAMES R. AVERILL, ANGER AND AGGRESSION: AN ESSAY ON EMOTION 7-13 (1982) (arguing that emotions are social constructions); Richard S. Lazarus, *Cognition and Motivation in Emotion*, 46 AM. PSYCHOLOGIST 352, 352-54 (1991) (arguing for cognitivist position). A psychologist has recently taken to the law reviews for the express purpose of showing that the provocation defense is "bad" psychology. See Finkel, *supra* note 149, at 796-803. For the recognition of similar ideas in evolutionary biology and anthropology, see Kahan & Nussbaum, *supra* note 38, at 291-92.

357. See DOUGLAS WALTON, THE PLACE OF EMOTION IN ARGUMENT 1 (1992) ("[A]ppeals to emotion have a legitimate, even important, place as arguments in persuasion dialogue.").

358. See RONALD DE SOUSA, THE RATIONALITY OF EMOTION 107-11 (1987); EXPLAINING EMOTIONS (Amélie Rorty ed., 1980); GIBBARD, *supra* note 293, at 126-32; ROBERT C. SOLOMON, THE PASSIONS: EMOTIONS AND THE MEANING OF LIFE at ix (1993). This view is accepted by philosophers working within a variety of traditions. See, e.g., MARK JOHNSON, MORAL IMAGINATION: IMPLICATIONS OF COGNITIVE SCIENCE FOR ETHICS 58-59, 132-33 (1993); RYLE, *supra* note 334, at 114-15; 1 CHARLES TAYLOR, HUMAN AGENCY AND LANGUAGE: PHILOSOPHICAL PAPERS 50 (1985); ROBERTO MANGABEIRA UNGER, PASSION: AN ESSAY ON PERSONALITY 101-07 (1984). Many thanks to David Luban for steering me toward Solomon's and Gibbard's works.

359. See MARTHA NUSSBAUM, THE THERAPY OF DESIRE 507-10 (1994).

360. The first criminal law scholar to attack the conventional view and to recommend a more cognitively based idea of emotion was Samuel Pillsbury, who made the argument in the context of the death penalty. See Samuel H. Pillsbury, *Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 674-84 (1989). This challenge was asserted in a broader context by Kahan & Nussbaum, *supra* note 38. Both give excellent treatments of the arguments against a behaviorist view of emotion. For that reason, I do not repeat those arguments at length here.

361. See MODEL PENAL CODE § 210.3 (1985) (requiring that there be "reasonable excuse or explanation" for defendant's claim of emotional distress).

362. 2 TAYLOR, *supra* note 35, at 159 (referring to use of term by Romantic philosopher Friedrich Schiller); see FRIEDRICH SCHILLER, ON THE AESTHETIC EDUCATION OF A MAN IN A SERIES OF LETTERS 34-45 (Reginald Snell trans., 2d ed. 1965).

363. This is a far from radical proposition, nor is it one that is necessarily inconsistent with liberal philosophical traditions. See HANNAH ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY 72 (Ronald Beiner ed., 1982) (analyzing Kantian "judgment" in terms of communicability of feeling: "[W]hen one judges, one judges as a member of a community," judgments that depend upon our ability to communicate

Antonio Damasio, a neuroscientist, recently reported that patients who had lost the capacity to experience emotion also found their ability to reason impaired.<sup>364</sup> He recounted the story of a judge who, because of a brain injury, lost the capacity to feel and resigned from the bench, saying "that his injury totally disqualified him": "[H]e could no longer enter sympathetically into the motives of anyone concerned."<sup>365</sup> As the judge's statement acknowledges, the partnership of emotion and reason may be necessary to any shared legal enterprise. Because it binds us to each other, emotion may be essential to our deepest commitments; indeed, it may even be essential to envisage the very relationships that make normativity possible.<sup>366</sup>

### *B. A Proposal for a "Warranted Excuse"*

Where does this understanding of emotion lead us? It helps us to see why we might distinguish intuitively the rapist killer from the departing wife killer. In the first case, we feel "with" the killer because she is expressing outrage in ways that communicate an emotional judgment (about the wrongfulness of rape) that is uncontroversially shared, indeed, that the law itself recognizes. Such claims resonate because we cannot distinguish the defendant's sense of emotional wrongfulness from the law's own sense of appropriate retribution. The defendant's emotional judgments are the law's own. In this sense, the defendant is us.<sup>367</sup> By contrast, the departing wife killer cannot make such a claim. He asks us to share in the idea that leaving merits outrage, a claim that finds no reflection in the law's mirror. In fact, the law tells us quite the opposite: that departure, unlike rape and battery and robbery, merits protection rather than punishment.

This understanding finally allows us to suggest an answer to the paradox with which we continually confront our law students: How can it be that a reasonable person kills in these circumstances and, if a reasonable person would, why not completely exonerate him?<sup>368</sup> The short answer is that

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"our feeling" to others) (citing IMMANUEL KANT, *CRITIQUE OF JUDGMENT* § 49 (Werner S. Pluhar trans., 1937)); see *id.* at 110 ("If thinking . . . actualizes the difference between our identity . . . then judging . . . realizes thinking, makes it manifest in a world of appearances, where I am never alone . . .").

364. In his study of patients who have lost their ability to feel because of brain surgery or accident, Damasio found that loss of emotion was tied to these patients' inability to make decisions, to wed themselves to common ideals, and to evaluate (i.e., place values upon) different choices. See, e.g., DAMASIO, *supra* note 355, at 46–51, 53. He concluded that, from a neurobiological position, a "[r]eduction in emotion may constitute an equally important source of irrational behavior." *Id.* at 53 (entire quote italicized in original).

365. OLIVER SACKS, *AN ANTHROPOLOGIST ON MARS* 287–88 (1995) (attributing example to Damasio).

366. The traditional master/slave dichotomy of reason/emotion assumes from the very start that both reason and emotion are "within us" as atomistic individuals. To see emotion as that which binds us together is not only to challenge the reason/emotion relationship, it is to challenge the underlying intellectual commitment that we are alone with our emotions/reason.

367. It is in this sense that the defendant is "us," rather than in the sense that she is a "reasonable" person or in the sense that she has exhibited "human frailty."

368. See Williams, *supra* note 64, at 742 (asking this question).

"reasonable men and women" do not kill in these circumstances, but reasonable men and women may well possess emotions that the law needs to protect. Without protecting some emotions, the criminal law contradicts itself. It punishes the very emotions implicit in the law's own judgments that killing and raping and robbing are both wrong and merit retribution. At the same time, protecting emotion does not require us to protect the deed. If we protect the act of killing, the criminal law commits itself to a different contradiction, one in which the State embraces or at least tolerates vigilantism.

We can now see why the provocation defense has always stood on the fence, partially condoning, yet partially exculpating. In every provoked murder case the law risks the embrace of revenge. To maintain its monopoly on violence, the State must condemn, at least partially, those who take the law in their own hands. At the same time, however, some provoked murder cases temper our feelings of revenge with the recognition of tragedy. Some defendants who take the law in their own hands respond with a rage shared by the law. In such cases, we "understand" the defendant's emotions because these are the very emotions to which the law itself appeals for the legitimacy of its own use of violence.<sup>369</sup> At the same time, we continue to condemn the act because the defendant has claimed a right to use violence that is not his own.

The important point to see here is that the provoked killer's claim for our compassion is not simply a claim for sympathy; it is a claim of authority and a demand for our concurrence. The defendant who asks for our compassion, that we feel "with him," asks that we "share the state of mind that [he] express[es]."<sup>370</sup> He asks that we share his judgments of emotional blame. Precisely because he asks us to embrace those emotional judgments, he asks us to embrace him as legislator, as one who rightly sets the emotional terms of blame and wrongdoing vis-à-vis his victim. When a defendant responds with outrage to wrongs the society otherwise punishes, he asks us to believe that he has legislated nothing. However, when a defendant responds with outrage to conduct society protects, he seeks to supplant the State's normative judgment, to impose his individual vision of blame and wrongdoing not only on the victim, but also on the rest of us.

As should be obvious by now, my theory of the defense is based as much on equality as it is on autonomy. All defendants who kill, with good reason or no reason at all, assert superiority over their victims, the superiority that comes from using the victim as a means rather than an end.<sup>371</sup> But in provoked

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369. This is a coherence argument and, like all coherence arguments, it provides a necessary, rather than a sufficient, condition of justice. I recognize that there may be cases that raise "hard" issues. I believe, however, that many of the most common provocation claims, particularly the claims I have emphasized in this Article, raise simple, rather than difficult, issues because they raise obvious issues of coherence.

370. See GIBBARD, *supra* note 293, at 172.

371. See Jean Hampton, *Punishment as Defeat*, in FORGIVENESS AND MERCY 124–28, 130 (Jeffrie G. Murphy & Jean Hampton eds., 1988) ("By victimizing me, the wrongdoer has declared himself elevated

murder cases we also risk allowing the defendant to assert an emotional and normative superiority. The danger is not only that the defendant will “use” the victim but also that he will rationalize the “use” of the victim by claiming that we share in his distribution of emotional blame. When we are sure that the victim would not have shared the killer’s emotional judgments (where she left because she was beaten) or when we know that the victim would not have expected punishment for the acts triggering the defendant’s outrage (bad cooking, complaints, and messy houses), we see that the defendant’s claim for compassion is false. It is a claim that we share in a set of emotional judgments vis-à-vis the victim that are not shared. To embrace such claims is to permit the defendant to sit on a higher normative plane.

### 1. *Merging Liberal and Traditional Theories*

The proposal I am suggesting turns on the idea of “warranted excuse.” To see how this brings the best of liberal and traditional positions together, it is important to address the obvious objections as well as the differences between my proposal and those recently advanced by other scholars, such as Professors Nussbaum and Kahan.

Conventional understandings of criminal law place defenses in two mutually exclusive categories: as excuse or justification. In the excuse category are defenses, such as insanity, that focus on state of mind; these defenses do not embody judgments that what the defendant did was “right” or “justified,” but that the defendant was less blameworthy. In the “justification” category are defenses, such as self-defense or necessity, which assume that what the defendant has done, overall, was “right” or “warranted.”<sup>372</sup> Traditionally, “excuse” and “justification” have been viewed as mutually exclusive categories: A defendant cannot be both excused and justified because an excused action presupposes that the action was wrong and therefore unjustified.<sup>373</sup> This assumes, however, a crucial feature of the inquiry—that we are evaluating acts and acts alone. To say that an act cannot be both justified and excused is to say something about acts, not emotions. It is perfectly consistent to say that one’s emotions are justified or warranted even when one’s acts are not. Indeed, as I have noted above, we may easily say that passionate killings are not justified even if we believe that the emotions causing some killings are, in some sense, the “right” emotion.

It is by focusing on the emotion, rather than the act, that my proposal distinguishes itself quite easily (both in theory and practice) from the

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with respect to me, acting as a superior who is permitted to use me for his purposes.”).

372. See Greenawalt, *supra* note 312, at 1903–11 (discussing different cases of warranted and unwarranted behavior as justified or excused).

373. See Dressler, *Provocation*, *supra* note 24, at 437 (“[E]xcuses only exist in circumstances where the conduct is unjustified.”).

traditional model of provocation as partial justification. My proposal does not depend upon the theory that the victim deserves to be punished.<sup>374</sup> Instead, I propose that the law should see the defendant's state of mind (his emotion) as something that, in some cases, it should protect. Unlike a partial justification model, my approach allows the defense to retain many features associated with excuse. The law need not impose an "objective" standard. It may continue to focus on the defendant's perception of the triggering act, rather than its quality in the abstract—something that the partial justification model rejects.<sup>375</sup> Thus, a defendant who believes she is being stalked, even if she is not, could properly claim her emotion was warranted, based on her perception of the situation. The law may also keep a liberal regard for the defendant's characteristics when they are relevant to the underlying defense<sup>376</sup>—again, something irrelevant to the partial justification model. Thus, a defendant who claims that she killed when enraged by a hate crime obviously raises an issue to which racial, gender, or other characteristics may be relevant, if not crucial. Finally, the law may provide for cases in which emotion builds over time—a position that traditional models typically reject.<sup>377</sup> A defendant who claims that he was sodomized and later outraged by taunts<sup>378</sup> will be allowed to pursue the defense,<sup>379</sup> as would a battered woman who claimed that her outrage and fear developed over time.<sup>380</sup>

What the law cannot keep, however, is its present normative incoherence. Claims of emotion (however deferential we are to the defendant's time frame, personal characteristics, or perception of the victim's conduct) must reflect

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374. The focus of the defense, in my view, remains on the defendant's particular emotional response, not the provoking act itself. I reject the position, adopted by a theory based on partial justification, that the defendant's culpability is reduced by the victim's "bad" act. I also reject the idea that victims have "forfeited" their right to insist on life because of their bad acts. *See id.* at 450–59 (discussing comparative moral wrongdoing and forfeiture theories supporting partial justification theory of provocation defense). Moreover, as I indicate below, *see infra* text accompanying notes 375–80, I hold to none of the usual practical implications of a justification or partial justification theory, theories which reject the defendant's perception of the act, the defense's applicability in cases where third parties are killed, and the relevance of the defendant's personal characteristics. *See Dressler, Reflections, supra* note 24, at 745–49 (discussing doctrinal implications of excuse and justification theories of provocation).

375. *See, e.g., Dressler, Provocation, supra* note 24, at 440 (discussing how partial justification theory judges triggering act without regard to defendant's emotional reaction).

376. *See, e.g., FLETCHER, supra* note 25, § 4.2.1, at 249–50 (arguing that defense should defer to wide set of defendant's characteristics); *see infra* text accompanying notes 404–07 (discussing *Bedder* case and arguing that impotence may be relevant to one normative reconstruction of issues in case).

377. *See KADISH & SCHULHOFER, supra* note 55, at 414–15, 419–25 (discussing common law doctrine of cooling time).

378. *See State v. Gounagias*, 153 P. 9 (Wash. 1915) (holding that defendant who was sodomized, taunted for two weeks, and finally killed assaulter did not qualify for heat of passion defense because of adequate cooling time).

379. It is no surprise that the MPC defense adopted the cumulative provocation rule in the context of a case that fits our strongest intuitions about emotional judgments, in a case where the defendant was forcibly sodomized. *See supra* text accompanying note 353. Professor Finkel's recent research suggests that, despite all the controversy, "cooling time" may have little to do with juries' perceptions of the appropriateness of a manslaughter verdict when the triggering event is a serious wrong such as a rape. *See Finkel, supra* note 149, at 784.

380. *See Commonwealth v. Stonehouse*, 555 A.2d 772, 780 (Pa. 1989).

relational, rather than idiosyncratic, norms. When a defendant asks for our compassion, he asks us to allow him to legislate vis-à-vis his victim, to claim that we should share his emotional assessment of wrongdoing and blame. We may be deferential to the defendant's predicament without assuming that the defendant's judgment would be shared by the victim or by the rest of us. To merit the reduction of verdict typically associated with manslaughter, the defendant's claim to our compassion must put him in a position of normative equality vis-à-vis his victim. A strong measure of that equality can be found by asking whether the emotion reflects a wrong that the law would independently punish.<sup>381</sup> This is not because the law makes his emotion "right," or "proportional," but because the "law" reflects an *ex ante*, *disinterested* determination of the normative equities implicit in the defendant's claim for compassion. In this sense, the law represents a kind of "original position" from which we may ask whether the defendant's emotion reflects normative superiority vis-à-vis the victim.

If accepted, this theory should bar many, if not most, provocation claims in intimate homicide cases. It would not be enough for a defendant to claim that a divorce or a protective order or moving out caused her rage. Defendants who ask us for compassion in these cases can point to neither law nor social norm that would punish leaving. My proposal would also bar the defense in cases in which the defendant claimed rage inspired by infidelity. Society is no longer willing to punish adultery.<sup>382</sup> In the absence of such a willingness, the adulterer killer has no claim that his emotions were no different from the emotions to which the law itself appeals to rationalize punishment. This does not mean that infidelity is not emotionally painful. It does mean that those who urge compassion based on infidelity can point to nothing in the law itself that would demand that we have compassion for their violent outrage. The law only suffers contradiction when it refuses to embrace a sense of outrage which is necessary to the law's rationalization of its *own use of violence*.<sup>383</sup> When the

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381. My proposal does not adopt the view that the unlawfulness of the provoking behavior is a sufficient test of warranted outrage. A defendant who claims that he was outraged by a traffic violation should not reach a jury because no rational trier of fact could find that the traffic violation provoked the kind of outrage proportional to the use of deadly violence. Moreover, even in cases where the claim of outrage is based on conduct that appears lawful, the defendant's provocation claim may reflect warranted emotion under a different normative reconstruction of the provoking behavior. See *infra* note 386 (discussing case in which Holocaust survivor killed marcher who was protected by First Amendment). Lawfulness is a guide to those kinds of outrage the law must protect. It is not a doctrinal standard. Nor should it be applied without regard to the ultimate purpose of the inquiry—to determine whether the defendant is asking us to accept a claim that permits him to legislate emotional blame vis-à-vis his victim.

382. See FRIEDMAN, *supra* note 63, 345–47 (reporting that fornication is generally no longer criminalized and adultery no longer punished); RICHARD A. POSNER, SEX AND REASON 260–61, 309 (1992) (discussing rarely enforced laws against adultery and consensual sodomy); see also Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660, 1670–72, 1672 n.89 (1991) (arguing that criminal laws against adultery are unconstitutional and, in practice, selectively enforced).

383. It is not enough that the claimed outrage reflects widely shared social norms. Most people, I believe, see sexual infidelity as a grave wrong, but would not support a referendum to put adulterers in jail.

law refuses to jail adulterers, the contradiction operates the other way: We are compelled to ask why it is that private parties may enforce a sense of outrage that society has refused itself.<sup>384</sup>

This approach isolates two sets of cases representing the ends of a continuum. In one set of cases, the defendant's outrage is based on acts that the law would uncontroversially punish. I have argued that in cases based solely on such acts, the defendant's claim of outrage may be warranted. On the other end of the continuum are cases in which the defendant's outrage is based on acts that are uncontroversially protected by law, such as departure. In such cases, I have argued that the defendant's claim of outrage cannot be warranted. In neither case is lawfulness alone a necessary or a sufficient measure of outrage;<sup>385</sup> courts and juries may also have to consider whether the defendant created the conditions of her own defense or whether the outrage was sincere, spontaneous, or proportionate to the crime. Obviously, there will be claims that will lie between these extremes, cases that cannot be confidently placed within one camp or another.<sup>386</sup> That, however, should stand as no enemy to a theory that easily resolves at least some of the most common provocation dilemmas.

Indeed, one of the great advantages of this approach is that it rejects both traditional and liberal views of the defense at the same time that it seeks to unify them. Until now, neither traditional nor liberal theories have been able to explain why we need *both* emotion and judgment to explain this defense. If, as partial justification theories would have it, the defendant is seen as less culpable because the victim has done something "wrong," then why do we need emotion at all?<sup>387</sup> On the other hand, if our theories of partial excuse are correct, and the defendant is less culpable because of affect alone, why do

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Nor is it enough that the parties may have agreed to remain faithful, *ex ante*, when they were married. Marriage partners agree to remain faithful but do not agree that breaches may be punished by violence. My argument that coherence compels the criminal law to protect the emotions to which the State itself appeals to justify its use of violence depends upon the potential use of violence, not unlawfulness in name only, nor in the violation of widely held social norms.

384. A similar analysis follows in cases in which defendant's claimed outrage is based on consensual homosexual conduct or a nonviolent homosexual advance. In states where the law protects the privacy of such conduct, such cases are no different from departure claims and should not reach a jury. In states where the conduct is criminalized but remains unenforced, the analysis follows the same track as the adultery example and, again, should not reach a jury.

385. Outrage inspired by nominally unlawful acts, such as adultery, should not reach a jury. Similarly, outrage inspired by what might be lawful acts, *see infra* note 386, is not necessarily exempt from treatment as warranted outrage. For further explanation, *see supra* note 381.

386. Some cases may involve a conflict between norms. Imagine a Holocaust survivor who, outraged by a Nazi march, kills one of the marchers in a fit of rage. This case can be reconstructed in two ways. The defendant will argue that his emotion was warranted and proportional to the monstrosity of Nazi war crimes, an emotion triggered by the march. The prosecution will argue that the defendant's emotion was disproportionate and unwarranted as a punishment of behavior protected by the First Amendment. Putting the conflict this way does not make the case easy but seems a definite improvement over the question whether the defendant's survivor status counts as a relevant "characteristic" in this "situation."

387. *See, e.g., Dressler, Provocation, supra* note 24, at 479 (noting that under justification theory "there would not seem to be any reason why the provoked killing must occur during a moment of passion").



we need to judge his emotions or his acts?<sup>388</sup> Of course, if we take these positions to their extreme—if the defense is conceived as all justification or all excuse—then we commit ourselves to some rather unsavory positions, to sanctioning deliberate acts of revenge or murderous responses to petty emotional slights. By focusing on the reasons for emotion, we bring together what excuse and justification seem to push apart, offering a theory of the defense that requires both spontaneous emotion yet also seeks to evaluate that emotion.

This position not only tends to bring together liberal and conservative models of the defense, it explains the defense as excuse without dissolving into false behaviorism. Those who have understood the defense as a partial excuse have found that their theory, if taken seriously, leads to acquittal rather than mitigation.<sup>389</sup> Those who have argued for a more traditional approach based on partial justification have found themselves in the equally uncomfortable position of arguing that there is something partially “right” about killing or that some people “deserve” to die. Seeing the defense as one of “warranted emotion,” we need not ascribe either to the idea that the defendant must be acquitted or that the act was somehow warranted. The defense remains an excuse because it depends upon the particular defendant’s state of mind (his emotional reactions, rather than his act), but it is an excuse bounded by relational meanings.

To adopt this theory, of course, requires us to reject the idea upon which almost all contemporary theories of the defense are predicated: that we partially excuse because the defendant lacks a full or fair capacity for self-control. Let me be clear about what we reject here: We do not reject self-control to embrace judgment; we reject a *disguised* judgment for one that is *acknowledged*.<sup>390</sup> No matter how much we try to tie the defense to behavior, no matter how insistent the rhetoric of subjectivity, decisions applying this defense express judgments about when defendants “should” exercise self-control. The law can continue to deny this if it chooses, to bury it within the

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388. See, e.g., *Maier v. People*, 10 Mich. 212, 220 (1862) (noting that if all it takes is emotion, then “by habitual and long continued indulgence of evil passions, a bad man might acquire a claim to mitigation which would not be available to better men”).

389. See Dressler, *Provocation*, *supra* note 24, at 465–66 (arguing for full exculpation in cases where actor is incapable of controlling his conduct).

390. Our belief that persons who lack self-control deserve less punishment purports to depend upon an analogy with physical coercion: The emotion is seen as the “gun to the head” of the defendant. The problem with this analogy is that there is no intellectually defensible stopping point: If true, we should be excusing almost all defendants (because almost all defendants kill in a state of high emotion), and the provocation defense should not be a mitigating factor but a full defense. When we mitigate rather than acquit, we acknowledge that this metaphor cannot be quite true. For one thing, the supposed coercion is not a gun; for another, the connection between the coercing force and the act does not lie in the hands of another person. Most importantly, however, we mitigate rather than acquit because we do not believe that emotions are like guns. We believe that we can reason ourselves out of emotion, indeed that emotion often embodies a kind of archaic reasoning that, once brought to light, often changes the emotion itself. See JONATHAN LEAR, *LOVE AND ITS PLACE IN NATURE* 29–68 (1990).

qualities of a reasonable person, but it pays a heavy price—one not only of incoherence, but of intellectual passivity and circularity. To say that we partially excuse provoked murderers to increase men's freedom but that their freedom is a condition of granting the excuse is to indulge in tautology.<sup>391</sup> In this circularity resides a space in which we find ourselves committed to beliefs about men and women and their relationships that the law itself long ago abandoned.

## 2. *Beyond the Relevance of Character or Characteristics*

As I indicated above, Professors Dan Kahan and Martha Nussbaum have recently proposed that judges should “judge” emotion as a reflection of the defendant's character and screen cases from juries where the emotion is “inappropriate.”<sup>392</sup> I agree with much of the Nussbaum and Kahan thesis about the criminal law's ambivalence toward emotion.<sup>393</sup> Ultimately, however, I believe the move to judgment is necessary, but not sufficient, to redress the dangers they identify.

First, it is not at all clear whether it would be enough to simply tell judges to evaluate emotional claims. Remember the lesson of New Hampshire: Even where courts have exercised a more active role in “judging” the reasons for the claimed emotion, and have imposed on themselves rules that bar provocation claims predicated on “lawful” acts, those rules have been promptly ignored in intimate homicide cases.<sup>394</sup> If courts are unable to see that departure or divorce are lawful, how are they going to be able to “screen out claims that rest on manifestly inappropriate emotional valuations”?<sup>395</sup> Kahan and Nussbaum recognize that evaluation alone “cannot assure justice,”<sup>396</sup> but argue that we would see the judgments as “inappropriate”<sup>397</sup> if they were

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391. Saying that someone lacks self-control, like saying that his acts are involuntary, purports to be a statement about behavioral events. However, it is typically a statement that already incorporates a judgment about responsibility. Typically, when we say that someone acted without self-control, we have already decided that he or she is not blameworthy. Of course, blameworthiness is the ultimate question that we are trying to answer. See RYLE, *supra* note 334, at 69–74 (arguing that many statements of voluntariness are in fact judgments of responsibility rather than statements about mental fact).

392. See Kahan & Nussbaum, *supra* note 38, at 365.

393. Indeed, Professor Nussbaum's book *The Therapy of Desire*, NUSSBAUM, *supra* note 359, had an enormous impact upon my thinking about the defense.

394. See *supra* text accompanying notes 301–05.

395. Kahan & Nussbaum, *supra* note 38, at 365. These authors also argue for a greater legislative role, see *id.* at 364, without acknowledging the dangers of a heated rush to legislative punishment. I say this as one who detests vapid and uninformed criticism of legislatures and politics in general. However, having spent three years of my life on the floor of the Senate watching crime legislation come to life, I am aware of the political winds that will blow in these circumstances.

396. *Id.* at 374.

397. *Id.* at 362–65 (arguing that “evaluative view forces decisionmakers to accept responsibility for their moral assessments and to give reasons for them in a public way” and that “acknowledging the evaluative underpinnings of the law fully exposes decisionmakers' assessments to the public”); *id.* at 364 (“We have suggested that evaluative doctrines have the potential to counteract the problem of bad morality by exposing the resolution of contentious issues to plain view.”).

fully exposed. The only problem is that these judgments *are* fully exposed and have been for some time. It is the law in almost every state of the union today, noncontroversially and unambiguously, that infidelity produces rationally murderous rages.<sup>398</sup> That we scholars now judge differently does not tell us anything about why that must be so. Nor, without further explanation, is it likely to change.

Second, it is also unclear to me whether Kahan and Nussbaum's focus on character will help or hinder judges in their efforts to evaluate defendants' claims of emotion. Putting aside for the moment difficulties with character theories in general,<sup>399</sup> I am concerned that any proposal grounded in character will collapse the evaluative inquiry back into a question of the defendant's identity. As I have argued in Part III, at least some of the difficulties of current approaches stem from the personification of the defense: liberal theories' tendency to naturalize evaluative positions within the minds of persons. If the evaluative project becomes hostage to a focus on character, we may end up where we began—describing the defendants. Whether that description is termed one of character or characteristics, our method may undercut our evaluative purpose. I believe that we can only emerge from that tendency, if we acknowledge that, defendants' claims of emotion ask us to accept meanings about relationships as much as to define personality or character.

Ultimately, Kahan and Nussbaum's emphasis on judgment, albeit brilliantly defended, leaves us a crucial question: How are we to know the "inappropriate" from the "appropriate" emotions?<sup>400</sup> Even if today we believe that it is wrong to see jealousy as a "rational" emotion, why are the present judgments of Kahan and Nussbaum (or myself) any better than H.L.A. Hart's judgment that killing in such circumstances is simply "human nature"?<sup>401</sup> Asking judges to take an active role in "judging" emotion may be necessary to reform the provocation defense, but it is not sufficient without a theory about which emotional judgments should count. Judges must not only be asked

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398. See LAFAYE & SCOTT, *supra* note 14, § 7.10, at 656 ("It is the law practically everywhere that a husband who discovers his wife in the act of committing adultery is reasonably provoked, so that when, in his passion, he intentionally kills either his wife or her lover (or both), his crime is voluntary manslaughter rather than murder."). As Kahan and Nussbaum note, the public has recently shown "outrage" for some cases of wife-killing where the sentence meted out was quite low. See Kahan & Nussbaum, *supra* note 38, at 346–47. We have had outrage about such sentences in the past, however, and it has not led to any grand movements of reform either from the judiciary, within legislatures, or from the criminal law academy. See, e.g., Lynn H. Schafran, *There's No Accounting for Judges*, 58 ALB. L. REV. 1063, 1065–66 (1995) (arguing that "little has changed since 1984, when the Colorado judiciary came under siege after a local judge gave a minimal sentence, to be served on weekends, to a man who killed his wife when she tried to flee their abusive marriage").

399. For more on the debate between character and choice theories, see R.A. Duff, *Choice, Character, and Criminal Liability*, 12 LAW & PHIL. 345 (1993), which argues that the debate rests on a false dichotomy.

400. Kahan and Nussbaum recognize this problem when they consider whether their proposal might enforce "bad morality." See Kahan & Nussbaum, *supra* note 38, at 362.

401. HART, *supra* note 33, at 33.

to “judge” but must be told “how” to judge claims of emotion. Indeed, to ask judges to “judge” without giving them a “theory” of judgment not only may be ineffective, it may be counterproductive if the judgments remain grounded in outmoded norms.

I have argued that the “how” question can best be answered by finding ways to put the victim and the defendant on an equal normative (or legislative) plane vis-à-vis their emotional judgments. Judges must not only evaluate, they must be convinced that a law that, in effect, embraces divorce and moving out as emotional “wrongs” cannot coexist in a world in which the law permits women to divorce and separate. To make such judgments requires a comparison of the defendant’s asserted reasons for his emotions against the reasons that both victim and defendant would share, *ex ante*. In many cases, this comparison will simply place the defendant’s claims to personal retribution in the mirror of what the law itself assumes as a proper basis for publicly sanctioned violence.<sup>402</sup> This approach offers no easy answers in hard cases.<sup>403</sup> It does, however, provide for coherence, a minimal condition of justice, in many of the most common provocation cases. In the end, my recommendation is as much that judges seek to find the claims of reason in emotion as it is a call for them, using existing law, to shape the jury’s inquiry by excluding reasons that are obviously improper bases for a manslaughter verdict.

Consider, in this light, a case in which departure is combined with elements of something that might give rise to a claim of grievous wrong: a physical fight prompted by revelations of infidelity and an announced intention to depart, for example. In such circumstances, the case should go to a jury to determine whether the fight amounts to a wrong sufficient to breed outrage. At the same time, however, the jury should be instructed that it cannot return a verdict based on departure alone nor infidelity alone and that these factors are irrelevant to the defendant’s claim of “rational” emotion. Deciding the question whether the defendant’s emotional response was proportionate to the fight may be a difficult one; it may be made more difficult by the presence of other factors. But, surely, that question is easier to answer, and is more consistent

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402. My reference to retribution here should not be taken to mean that I am in any way advocating a pure retributive theory of punishment. I believe that my argument is consistent with various theories of punishment, including both retributive and utilitarian theories. Indeed, Professors Kahan and Nussbaum have laid this out quite clearly in their article. See Kahan & Nussbaum, *supra* note 38, at 350–58. Perhaps more than theirs, however, my proposal’s emphasis on an equal normative plane has obvious resonance with theories of punishment that include some recognition of the expressive and restorative aspects of punishment.

403. One can easily imagine a case, for example, in which coherence alone would not be enough. Imagine a different time and place in which the law punishes those who are members of particular political organizations. A defendant kills, provoked by the knowledge that his victim was a member of the outlawed organization and, hence, traitorous. If the State is willing to punish those who are members of the organization, then the defendant’s claim poses no danger of incoherence. Not only is proportionality a clear limit on this exercise, comparing the defendant’s reasons to legal sanctions is a guide; it is not sufficient alone. See *supra* note 381.

with a coherent theory of the defense, than are questions about norms wrapped up in the guise of questions about the defendant's character or characteristics.

We can see this quite clearly by considering how the famous *Bedder*<sup>404</sup> case would fare under my proposal. In *Bedder*, the defendant, an eighteen-year-old who knew he was impotent, went to a prostitute. When he failed to perform, the prostitute jeered at him and tried to leave; the defendant held on to her as she hit and kicked him, then stabbed her to death.<sup>405</sup> Traditionally, scholars have had great sympathy for the youthful defendant but have had trouble defending the proposition that impotence is a characteristic of a reasonable person.<sup>406</sup> Meanwhile, feminists have seen this sympathy as another example of the law bowing to male concerns about virility.<sup>407</sup> Based on my theory of the defense, the *Bedder* jury should have been instructed that it could not return a manslaughter verdict because the defendant's virility was a matter of particular sensitivity to him.<sup>408</sup> There is a possible claim for compassion in *Bedder*, but it is not one that can be seen by focusing on impotence as an attribute, a characteristic, or a reflection of character. That claim lies in an unstated analogy between *Bedder* and those who are victimized for their attributes; that is, because of their handicap, race, or sex. Society has, for some time, recognized that violence motivated by hatred of immutable characteristics is a grievous wrong that should inspire outrage, an outrage reflected in hate crime laws. I believe that sympathy for *Bedder* comes from this unstated analogy: The argument is that the prostitute attacked *Bedder* precisely because he failed to meet stereotypical sexual performance standards for adult males. As a juror, I would not accept this.<sup>409</sup> Indeed, it seems far more likely that the "biased judgment" here was one *Bedder* himself perpetrated by blaming the victim for his own handicap.<sup>410</sup> Nevertheless,

404. *Bedder v. Director of Pub. Prosecutions*, 2 All E.R. 801 (H.L. 1954).

405. See *id.* at 802-03. For an American case involving similar facts in which the appellate court ordered a new trial for failure to instruct on EED, see *People v. Moye*, 489 N.E.2d 736, 738 (N.Y. 1985), which states that the defendant was jeered at by a woman for his impotence and told, "go on little boy. I don't need you."

406. See Dan-Cohen, *supra* note 260, at 993-95 (noting traditional difficulties with case).

407. See, e.g., Taylor, *supra* note 63, at 1689-92 (arguing that passion has been understood from reasonable "male" standard, often reflecting male understandings of sexuality).

408. The jury should also have been instructed that it could consider whether *Bedder* intentionally created the conditions of his own defense either by refusing to allow the victim to leave (her "striking" him in this scenario is an act of self-defense) or by soliciting the prostitute knowing he was impotent.

409. Others appear to agree with this intuition. In Professor Finkel's study of mock jurors, a fact pattern similar to that in *Bedder* produced "significantly more" second degree murder verdicts than did a fact pattern based on the decision in *State v. Gounagias*, 153 P. 9 (Wash. 1915). See Finkel, *supra* note 149, at 783. Professor Finkel stressed the triggering event: "[T]he sodomy makes a difference: when there is no sodomy but only a taunt [as in *Bedder*], the voluntary manslaughter verdicts are the lowest." *Id.* at 784.

410. Professor Finkel's study again supports this intuition: He found that sentences "are higher in the impotence than in the no impotence condition," because jurors believed *Bedder* "chose to put himself in a situation where failure and provocation were all but inevitable." *Id.* at 785; see also *id.* at 789 (elaborating on this point). Moreover, when Professor Finkel posited that the victim "feared" the provoker (as in the case of a bias-motivated attack), the jurors returned lower sentences than when the *Bedder*-figure exhibited

posing the issue to the jury in this way does not require us to ask whether impotence is a characteristic of a reasonable person,<sup>411</sup> nor does it ignore the potential for biased generalizations (of men or women).<sup>412</sup> It exposes the judgments so that a choice may be made.

### B. *The Twin Shadows of Bias and Fear*

Two shadows must be addressed if we are to speak of “real-world” solutions. One we have already seen; it is the capacity of older norms governing relationships to transform themselves into less controversial guises. The other is no less real; it is the tendency of “quick fix” legislative solutions to embrace any proposal that will increase punishment, no matter how this might dislocate the relationships among murder verdicts and resulting sentences.

Given these shadows, abolition poses serious risks. It offers a very neat solution but one likely to invite a heated legislative rush to punishment. Indeed, in the name of eradicating bias, it may simply reinvent it. There is no guarantee, for example, that abolition will not rid us of one hierarchy only to create another. It is easy to imagine a world in which departure or infidelity takes on a new life at the sentencing stage, during plea bargains, or even within the context of other defenses. If courts have managed to tolerate the kinds of conflicts we have seen thus far, there is no reason to believe that they will not simply transfer these conflicts into new and less controversial guises. Indeed, if there is anything this Article has tried to show, it is that the “veil of relationship” is extraordinarily resistant to change and will reassert itself unless consciously exposed.

Real “reform” of the passion defense must not only reconstruct the defense, but also address the position of manslaughter within a particular jurisdiction’s law of murder. It is not enough to redraft the passion defense; such an effort might cause major distortions in murder law.<sup>413</sup> Many years

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“anger.” *Id.* at 784; *see also id.* at 789 (“[A] one word change from ‘anger’ to ‘fear’ produced a significant reduction in the sentences handed out.”).

411. Professor Finkel’s study suggests that the question of impotence makes no difference in jurors’ determinations. *See id.* at 784 (finding that jurors’ mock verdicts in *Bedder* case do not change when defendant’s impotence is included or excluded from fact scenario).

412. This explains why some cases involving verbal insults should reach juries. For example, the defendant who kills because of racial epithets may well be evincing the kind of emotion that the community believes responds to a “grave wrong,” a wrong that the law itself recognizes and punishes in “civil rights” or “hate crimes” statutes. Of course, if the insults themselves are accompanied by an implicit threat of injury, an emotional response to the implicit threat would be an independent reason to send the case to the jury. *See, e.g., State v. Ott*, 686 P.2d 1001, 1013 (Or. 1984) (citing hypothetical of racial slurs against Asian defendant interned in relocation camp). This obviously leaves some difficult decisions (e.g., whether the insult was sufficiently evocative of sincere emotion or whether the response was disproportionate to the verbal assault), but it places these cases on firmer normative ground than does current law.

413. This is particularly true in jurisdictions in which the “defense” mitigates from first to second degree murder, rather than manslaughter. *See, e.g., WIS. STAT. ANN. §§ 939.44(2), 940.01(2)(a)* (West 1996).

ago, the provocation defense amounted to a unified concept, both negating a finding of malice murder and, at the same time, yielding a manslaughter verdict. The idea, at the time, was that the defendant who killed with malice had a "bad" character, while the one who killed in spontaneous rage evidenced a momentary lapse of an otherwise sound constitution. Modern developments have done much to change this picture. Today, we have dropped the idea of malice in favor of a mentalist approach: Purpose or premeditation now substitute for malice. Perhaps more importantly, emotion no longer negates a finding of the deliberation typically associated with first degree murder. The Model Penal Code, for example, assumes that one who acts with passion has the intent to kill.<sup>414</sup>

In theory, this development was intended to grant more power to emotion to excuse. The hope was that juries would find even greater reasons in emotion for sympathy and return many more manslaughter verdicts.<sup>415</sup> In fact, criminal defense lawyers will tell you that this strategy was, on the whole, a failure. To the extent juries did return such verdicts, legislatures promptly increased the penalties, transforming the effect of a manslaughter verdict into second degree murder. At the same time, where juries were hesitant to return manslaughter verdicts, they often found themselves committed to a first degree murder conviction because "purpose" or "intent" could be created in the blink of an eye.<sup>416</sup>

When the law rejected the older malice formulation in favor of something more "psychological" in nature, it repeated the very same intellectual moves we have seen in the context of the provocation defense. In the name of ridding the law of the normative concept of "malice," it embraced an attributional logic. This simply shifted the normative judgments into a different rhetorical formulation, into questions about mental events. The underlying question was still the same: Do the defendant's acts clearly demonstrate that he has placed himself outside the human community? The method for answering those questions, however, now turned on whether one could form an "intent" in the blink of an eye or whether sixty stab wounds necessarily entailed premeditation.<sup>417</sup>

Juries should be free to find that sincere claims of emotion are relevant to the question of second, rather than first, degree murder even if those emotions reflect poor judgments. This is not because the emotions are reasonable under the circumstances, not because the law needs to protect these emotions. It is

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414. See *supra* note 267.

415. See Tentative Draft, *supra* note 49, at 46.

416. See *Commonwealth v. Carroll*, 194 A.2d 911, 916 (Pa. 1963) (expressing agreement with proposition that "[t]he law fixes no length of time as necessary to form the intent to kill, but leaves the existence of a fully formed intent as a fact to be determined by the jury") (citation omitted).

417. See, e.g., *People v. Anderson*, 447 P.2d 942, 945, 953 (Cal. 1968) (finding of premeditation unsustainable even though victim sustained over 60 wounds).

because sincere, spontaneous emotion may be probative on the question of whether the defendant has deliberately chosen a course of action that places him outside the human community. This position recognizes that emotions often reflect poor judgments uncharacteristic of the individual and clouded by the needs of the moment. When sincere emotion becomes relevant to the question of second, rather than first, degree murder, we do not condone, but tolerate the emotion. We acknowledge that there is a middle ground between emotions society cannot tolerate and those it must embrace. Such tolerance does not mean that we call the homicide by any other name than murder; it does not "understand" the defendant's emotions in ways that a provoked manslaughter verdict does. Sincerity and tolerance is the measure of such an emotion, not rationality or reasonableness in the situation.

Critics may argue that this approach will simply recreate the hierarchy of offenses that we have already seen: Men who kill women who leave will claim sincere emotion that, if believed, will create a second class of homicide cases wrapped up in second degree rather than first degree murder. The dangers of recreating this kind of hierarchy are obvious and should concern us enough to realize that they are as likely here as in other guises.<sup>418</sup> I have no illusion that the same stories of betrayal and departure will not find new doctrinal homes. There is no way to restrict this kind of reasoning other than to expose it with a conscious attempt to measure the defendant's story against the "voice of . . . conscience"<sup>419</sup> embodied in the law's commitments. All one can do is make it clear to juries, in this and other contexts, that they cannot find the defendant guilty of a lesser crime (whether that crime is second degree murder, passion manslaughter, or reckless homicide) simply because of the decedent's departure or moving out or dancing; that they cannot do this lest they contradict the law's own commitments to such freedoms for all. There is no assurance of justice here, only hopes that we may, at least, see some partialities in law's own mirror.

Current law, in the name of sympathy, asks defendants to play a terrible seesaw game in which they either "win big" with a manslaughter result or, more likely, are forced to "roll the dice" on a first degree murder verdict. In this sense, I do not believe that behaviorism has been a particular friend of defendants, no matter how sympathetic to the circumstances it has appeared to be. When the law conceives of emotion as either "intent" (no questions asked) or "no intent" (no questions asked), it permits juries to reach unsavory results on both ends of the spectrum—to return manslaughter verdicts for killings of revenge and, at the same time, to return first degree murder verdicts in cases of spontaneous but poor judgment. In the end, this will change only if we

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418. See, e.g., Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post-Furman Era*, 49 SMU L. REV. 1507, 1508 (1996) (arguing that courts apply domestic discount in death penalty cases).

419. Kahan & Nussbaum, *supra* note 38, at 374.



understand that judgments do not describe us, along with our qualities, but commit us to each other. Only then will we be able to create a law of murder that neither punishes tragedy nor embraces revenge.

## APPENDIX A: METHODOLOGY

I. *Scope of Sample*

The MPC data set includes EED claims reported<sup>420</sup> in all<sup>421</sup> appellate or trial opinions published during 1980 to 1995, in which defendant alleged that a person with whom he was intimate provoked the killing or attempted killing.<sup>422</sup> The data set for “traditional” and “mixed” jurisdictions was limited to all such provocation claims reported in appellate or trial opinions during the same time period within selected jurisdictions.<sup>423</sup> The total number of claims included in the final MPC, mixed, and traditional data sets was 267.<sup>424</sup>

II. *Search Methodology*

For the initial search, I employed standard computerized databases (LEXIS and Westlaw) to obtain a broad set of homicide cases (over 1000) that my research assistants and I would later cull individually. The computer search sought to uncover any homicide or attempted homicide case in which the defendant claimed EED or provocation at trial. In MPC jurisdictions, the search request was constructed to reflect the defense’s reference to “extreme emotional distress or disturbance.” Because these are terms of art, a different search request was used in “traditional” or “mixed” jurisdictions, where the search sought to uncover any claim of “provocation” or “heat of passion.”<sup>425</sup>

After conducting the initial search, my research assistants and I reviewed the cases individually to determine whether they met the following criteria: (1) the case involved adult intimate provocation; and (2) the defendant asserted an EED or provocation claim at trial. We excluded many cases because they did not involve an “intimate homicide.” We excluded other cases because they were “false hits”—cases in which the words “provocation” or “emotion” appeared in otherwise irrelevant contexts. Finally, we excluded cases if they failed to provide sufficient factual material to code the nature of the EED or provocation claim.

*Intimate homicide defined:* I defined intimacy broadly to include any claim in which the relevant parties are or were married; are or were cohabiting; have or had a child in common; have dated, are dating, or sought to date; or have or are engaged in consensual sexual intercourse.<sup>426</sup> The relevant

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420. A “reported” case means any case that appears in the LEXIS or Westlaw computer databases. This includes cases that may be “unreported” for judicial purposes.

421. The MPC research represents an attempt to retrieve all relevant provocation claims, not simply a sample of those claims. It is possible, of course, that some claims were missed despite efforts to achieve an MPC universe. Without a showing of systematic bias that resulted in missed claims, however, there is no reason to believe that this substantially undermines the viability of the MPC data set.

422. The sample does not include cases in which an EED or provocation claim was made solely to an assault charge.

423. For a discussion of how the “mixed” and “traditional” jurisdiction data sets were constructed, see *infra* text accompanying notes 446–51.

424. This is not the total number of cases, but the total number of claims. See *infra* text accompanying notes 428–29 (explaining that cases were counted by claim, rather than case, to account for multiple provocation claims).

425. The search in MPC jurisdictions was: “Date(aft 1979) and (extreme w/3 emotion! w/3 (distress or disturbance)) and (homicide or murder or manslaughter).” The search in “traditional” or “mixed” jurisdictions was: “Date(aft 1979) and (provok! or provoc! or (heat w/2 passion)) and (homicide or murder or manslaughter).” The search was first performed during the middle of 1995 and was later updated to include all claims reported through the end of 1995.

426. These determinations were made based on the defendant’s allegations. For example, if the defendant alleged that he was engaged in consensual sexual intercourse, this claim would be accepted for

relationship is the relationship between the provoking party and the killer. If a stranger provoked the killing of an intimate (say, for example, a stranger raped the defendant's wife and the defendant killed the stranger), I did not include the resulting EED claim in the data set. However, if an intimate provoked the defendant to kill a stranger (for instance, a defendant enraged by his wife killed the stranger helping her move), that claim was included.

*Trial "claim" defined:* To be included in the data set, an opinion must have reported that the defense had been raised at trial, whether it reached a jury or not. If a defendant argued EED or provocation for the first time on appeal or never sought a jury instruction, I excluded the case from the data set as barred by an independent procedural ground. If a defendant argued EED or provocation only as a mitigating factor at the penalty phase of a death penalty case, I also excluded the case.<sup>427</sup>

*Multiple murder charges:* In a number of cases, the defendants raised the provocation defense with respect to more than one charge of murder or attempted murder. In others, the defendant raised the provocation defense with respect to only one victim in a multiple victim case. I counted each provocation claim rather than each case in which a provocation claim occurred. Thus, if a defendant made a provocation claim with respect to one of two murder charges, I considered it a single provocation claim.<sup>428</sup> If, however, there were two charges and two provocation claims made, I counted the case as two claims.<sup>429</sup> I typically resolved doubts against multiple claims.

### III. Substantive Coding

*A. Initial Coding:* My first-round analysis coded claims for three substantive factors: "separation," "infidelity," and "physical violence," and left a residual "other" category for claims in which the three substantive factors were absent.

*Separation:* I defined separation to include cases in which the provoking party sought to separate from the relationship, by stating an intention to leave, moving out, filing for divorce, changing the locks, etc. The separation category also includes cases in which the parties are divorced, separated, or estranged, or in which the "separation" was by force of law. For example, it includes cases reporting that the parties were temporarily separated under an order the provoking party sought (e.g., the victim obtained a protective order shortly before the killing). It also includes cases of "separation" from a casual relationship, commonly termed "rejection." If the case made clear that the defendant initiated the separation, I did not classify the case as a "separation." In such cases, there is no evidence suggesting that the defendant is claiming that the loss of intimacy prompted the killing in whole or in part, even if the parties are in fact separated at the time of the killing (e.g., a post-divorce physical attack on a

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purposes of categorization. Claims in which the defendant admits to a rape/killing are not included in the data set as these are cases of coerced intimacy.

427. Death penalty cases were included if the defendant argued at the guilt phase of the trial that he or she was entitled to an EED instruction, yielding a manslaughter verdict.

428. For an example of a multiple victim case classified as one claim, see, e.g., *People v. Berk*, 629 N.Y.S.2d 588 (App. Div. 1995), *aff'd*, 667 N.E.2d 308 (N.Y. 1996) (stating that defendant killed estranged wife and new lover, but clearly asserted EED claim only with respect to wife).

429. For an example of a multiple murder case classified as two claims, see, e.g., *State v. Falvey*, 1993 Minn. App. LEXIS 737 (Ct. App. July 27, 1993) (stating that defendant killed estranged wife and person helping her move to California).

battered woman who never argued that the "separation" had anything to do with her EED claim).<sup>430</sup> Finally, I did not consider it a "separation" case if there was only evidence of a struggle for control (e.g., the victim would not return home with the defendant), without evidence that this reflected a deliberate desire to end the relationship.<sup>431</sup>

*Infidelity:* I defined infidelity broadly, to include not only sexual intercourse but also claims of dancing with another, phoning another, or dining with another. Infidelity includes cases in which the defendant actually witnessed the infidelity as well as allegations, rumors, imagined infidelities, or pathological jealousy. The mere presence of "another" at the scene of the crime, however, was not sufficient (without defendant reliance on that fact for a claim of infidelity) to classify a claim within this category. As with "separation," the infidelity must be on the part of the provoking party/victim. If the defendant was unfaithful, this does not make the claim one of "infidelity."

*Physical violence:* I defined physical violence broadly to cover any physical (nonverbal) violence by the provoking party prior to the killing. This includes minor acts (slapping and scratching) as well as threats to kill. It also includes a pattern of physically violent acts (e.g., battering) that occurred before the killing if this was the nature of the defendant's claim. As in the cases of infidelity and separation, the physical violence must have been on the part of the provoking party/victim. The defendant's own use of physical violence did not yield a physical violence categorization.

*Other:* I defined other to include any claim that did not include any of the other three substantive factors. It includes cases in which the claim was based on a nonphysical verbal argument or "marital dispute," claims based on a mental disorder, and cases in which the defendant brought together a variety of stress-causing events (e.g., death in the family, loss of job, early childhood abuse).

**B. Classifying Claims in Exclusive Categories:** The coding process revealed that there were a substantial number of claims in MPC and mixed jurisdictions that involved separation alone, without the presence of infidelity or physical violence. It also yielded evidence that there were a substantial number of infidelity claims in MPC and mixed jurisdictions in which the relationship was over or ending. To further isolate the role of separation, I classified claims into the following categories.

1. *Departure:* I classified a claim as "departure" if it involved the "separation" factor as defined above and did not involve either physical violence or sexual infidelity.

*Exclusivity:* I resolved doubts against a finding of departure alone. Mention of a romantic rival was sufficient to place a claim in the next category, "separation and infidelity,"<sup>432</sup> unless it was absolutely clear that the claimed infidelity was irrelevant to the defendant's provocation claim. If, for example, the defendant came upon his ex-wife with another man (no matter whether that happened immediately after the divorce or three years later), I classified that claim as "separation and infidelity," even if the case

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430. This means, of course, that there are some cases that involved "separated couples" that I did not count in my definition of "separation."

431. See, e.g., *People v. Birreuta*, 208 Cal. Rptr. 635 (Ct. App. 1984) (reporting that wife left home after argument and that defendant tried to persuade her to come home); *State v. Werman*, 388 N.W.2d 748 (Minn. 1986) (reporting argument because earlier in evening victim had refused to come home with defendant from social occasion). I classified neither case as a "separation."

432. See, e.g., *Hull v. State*, 556 A.2d 154 (Conn. 1989) (stating that defendant pursued wife who was trying to exit relationship and referring to evidence submitted at trial that victim told defendant during argument that he could believe what he wanted about rumors that she had returned to her former husband).

looked, in all other respects, like a "departure" claim. Finally, mention of physical violence triggered by the departure placed the claim in the "physical violence" category unless it was clear that the defendant's provocation claim did not rely on the physical violence.

*Victim/Provoking Party Initiation:* To be classified as a "departure" claim, there must have been some evidence<sup>433</sup> that the provoking party/victim (as opposed to the defendant) sought the departure/separation. If the defendant sought the divorce or the separation against the victim's wishes, I did not classify the claim as a "departure" because the victim's interest in leaving was not at stake. Evidence that the victim was leaving or sought to leave was sufficient in most cases to classify the claim in this category. References to the parties' divorce, legal separation, or the filing of a protective order was only sufficient if it was clear from the circumstances that the victim/provoking party sought the divorce, separation, or protective order.<sup>434</sup> I occasionally found victim-initiated separation in a case in which the defendant, rather than the victim, moved if the circumstances indicated that the victim sought to end the relationship.

*Related Issues:* I classified a claim as "departure" despite claims characterizing the departure or separation in terms of other issues or as the victim's fault. My key purpose here was to isolate claims of departure from claims involving infidelity or physical violence. To be classified as a "departure" claim it was only necessary that the defendant's claim could not have been made without the departure. For example, in cases in which there was evidence that the victim sought to leave or the relationship had ended, it was not sufficient to oust the claim from this category for the opinion to report that an unwarranted sexual abuse charge led to the divorce prompting the killing, or that the defendant explained that he was upset because the victim would not let him see his children.<sup>435</sup>

2. "*Separation and infidelity*": I classified a claim as "separation and infidelity" if it included both the "infidelity" and "separation" factors, as defined above, and the provocation claim was *not based* on physical violence.

*Exclusivity:* As indicated above, if there was evidence of a physical altercation before the killing, I classified the claim as "physical violence" unless it was clear that the provocation claim was not based on physical violence.

*Infidelity:* As indicated above, I defined infidelity broadly, including claims in which the primary

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433. This "some evidence" standard is similar to the standard used to decide whether there is sufficient evidence to instruct a jury on a particular verdict. The evidence may be documentary or testimonial. It may have been introduced by the prosecution as well as the defendant. Often, defendants in these cases present several theories of defense or they present no affirmative case at all. That the evidence is placed in the record by the prosecution does not mean that it cannot be relied upon by the defendant to assert his or her EED claim. Defendants often make precisely such a claim on appeal.

434. It was sufficient, for example, for the opinion to report that the defendant "was under court order to stay away from his estranged wife's home." *Matthews v. Commonwealth*, 709 S.W.2d 414, 417 (Ky. 1985).

435. See, e.g., *State v. Hinckley*, 502 A.2d 388 (Conn. 1985) (reporting that defendant grew despondent and angry about continuing financial negotiations and child support stemming from divorce); *State v. Fair*, 496 A.2d 461 (Conn. 1985) (reporting that defendant claimed he was upset about his wife's taking of their child in case where she was killed shortly after defendant was told she was moving to Boston); *Matthews v. Commonwealth*, 709 S.W.2d 414 (Ky. 1985) (reporting that defendant's EED claim was based on allegedly unjustified filing of warrant claiming that he had sexually abused his daughter, which resulted in protective order).

relationship to which the defendant claimed allegiance had ended in divorce or separation. I included claims in which the claimed "infidelity" involved dating, dancing, or being in the company of another.

*Victim/Provoking Party Initiation:* In most claims in this category, it was clear that the victim sought to separate from the relationship. Evidence sufficient to establish "departure," as defined above, was sufficient to show that the victim sought to separate (e.g., divorce, filing for divorce, a protective order, moving out). In addition, in this category evidence that a victim sought to continue a new relationship and that he or she was "estranged" from an earlier relationship was considered sufficient evidence of victim-initiated separation.<sup>436</sup>

3. "*Simple Infidelity*": Simple infidelity claims were those that involved infidelity in a relationship assumed to be ongoing or continuing. Unless the criteria for separation were met, I classified a claim involving infidelity as "simple infidelity." Any claim that involved infidelity in an ongoing relationship that also involved physical violence was categorized as "physical violence." The definition of "infidelity" was the same for "simple infidelity" claims as it was for "separation and infidelity" claims.

4. "*Physical Violence*": Without regard either to infidelity or departure, a claim that physical violence prompted a killing may itself be sufficient to reach a jury on a provocation or EED theory. Therefore, the purpose of this category was to include any claim, however clear the presence of other factors, in which physical violence might have constituted an independent basis for an EED or provocation instruction.

*Nonexclusivity:* I included in this category any case in which the provoking party's physical violence appeared to trigger the homicide, whether or not there were other factors present, such as infidelity or separation.

*Physical Violence:* To satisfy this category, the claim must have been based on actual or threatened physical violence. If a case reported simply that there was an "argument," it was assumed that the claim involved only verbal behavior and was coded as "other."

*Victim-initiated:* To be classified as physical violence, the claim had to include violence by the victim or provoking party against the defendant. In some cases, this physical violence may have been defensive in nature. Unless it was clear that the defendant's own violence promoted the claimed struggle, I included such claims in the physical violence category.

*Overlap:* In order to acknowledge the presence of separation and infidelity in physical violence claims, this category was divided into four subcategories: (a) claims based on physical violence alone; (b) claims based on physical violence where separation was a factor; (c) claims based on physical violence where separation and infidelity were also factors; and (d) claims based on physical violence where infidelity was also a factor.

5. "*Other*": Other claims were claims that failed the criteria set forth for the other four categories. These claims typically involved EED or provocation claims based on factors unrelated to the parties' relationship (e.g., failing businesses), verbal arguments unrelated to separation or departure (e.g.,

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436. See, e.g., *State v. Chicano*, 584 A.2d 425, 428 (Conn. 1990) (reporting that defendant and victim "had been involved in a romantic relationship that had deteriorated by the end of 1986" and that in early 1987, defendant found victim with another man).

insulting a partner, vague claims of problems in a relationship unrelated to separation, departure, or infidelity), or claims based on psychological evidence<sup>437</sup> not falling within any of the other categories.

*Nonoverlap with physical violence:* I included any case that involved physical violence, even if it also included claims about life stresses or taunts, in the physical violence rather than in the “other” category. Again, I did this because physical violence might be a sufficient basis to reach the jury.

*Nonoverlap with infidelity:* I classified any claim based in part on infidelity in the “infidelity” or “separation and infidelity” categories, rather than in the “other” category. However, a claim based on “trouble” or “fighting” in an intimate relationship was not sufficient to show departure or infidelity and was classified as “other.”<sup>438</sup>

*Nonoverlap with separation:* For a few claims, there was evidence of factual separation or rejection but there was insufficient evidence to place the case within the “separation” or “departure” categories. For example, in *People v. Glaser*,<sup>439</sup> the defendant based his EED claim on the division of the proceeds from sale of the marital residence, but it was unclear whether the dispute was about money or the divorce itself.<sup>440</sup> I classified it, instead, as “other.”

*C. Instructional Coding:* The purpose of my research was to determine whether particular kinds of claims did or did not reach juries. A claim was coded as a “yes” instruction in the following circumstances: (a) the court reported that an instruction was given or that the jury heard such a claim; (b) the opinion was ambiguous, but the briefs confirmed that an instruction was given; (c) the defendant clearly relied on a provocation claim, introduced evidence in support thereof, and did not appeal for failure to instruct on provocation; or (d) the verdict was premised on EED, provocation, or heat of passion.<sup>441</sup> In bench trials, claims were not coded as a “yes” instruction except in two circumstances: (a) the court made an independent ruling on EED that was the equivalent of what would have been necessary to send a claim to a jury; or (b) the trial court returned a manslaughter verdict based on EED or provocation.

I based my instructional coding on proper trial procedure. Thus, for example, if the trial court gave a provocation instruction but on appeal, the appellate court concluded (by holding or so stating) that the giving of the provocation instruction was incorrect, the claim was not coded as “yes” on the instruction issue. A similar rule applied in the opposite direction: If the trial court did not give an instruction and the appellate court reversed for failure to grant an instruction, the claim was coded as “yes” instruction.<sup>442</sup> It should be noted in this context that by far the vast majority of MPC cases coded, 83% (112/133), were not appealed on the ground that the trial court failed to instruct on provocation, although such appeals were far more frequent in traditional jurisdictions.<sup>443</sup>

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437. See, e.g., *State v. Counts*, 816 P.2d 1157 (Or. 1991) (reporting defendant’s claim that he was suffering from delusions that his wife was poisoning him and his dogs).

438. See, e.g., *State v. Skjonsby*, 319 N.W.2d 764 (N.D. 1982) (reporting that defendant based his EED claim on various life stresses such as business failure and “problems with his relationship”).

439. 564 N.Y.S.2d 893 (App. Div. 1990).

440. See *id.* at 894.

441. It was not sufficient that a manslaughter verdict alone was returned because manslaughter may be based on a variety of theories, including recklessness or imperfect self-defense. It was sufficient, of course, if there was independent evidence of a provocation instruction, even if the ultimate manslaughter verdict was based on a different theory.

442. Legal rulings on provocation might not necessarily take the form of a question about the instruction itself.

443. See Appendix C (listing traditional claims and noting appeals).

#### IV. Data Set Creation

A. *MPC Jurisdictions*: I included as MPC jurisdictions eleven states and two territories that have adopted the MPC in whole or part.<sup>444</sup> I included states without regard to differing judicial interpretation of the statutes and without regard to differences in statutory formulation.<sup>445</sup>

B. *Traditional Jurisdictions*: Traditional jurisdictions include those retaining common law rules for *both including and excluding* provocation claims.<sup>446</sup> The object of my search was to identify two jurisdictions that generated a significant number of intimate homicide claims and tracked as closely as possible the traditional rules for including and excluding provocation claims. I chose the jurisdictions as follows: Out of the states estimated to follow traditional rules,<sup>447</sup> I considered the state producing the greatest number of search hits the “anchor” state. I chose the “supporting” jurisdiction to mirror, as closely as possible, the law in the “anchor” jurisdiction. In my data set, Illinois produced the greatest number of hits out of the jurisdictions I estimated to follow traditional rules. I chose Alabama for two reasons: (a) it produced a significant number of hits; and (b) it provided a close “legal” fit both with Illinois’s provocation rules and with the definition of a “traditional” jurisdiction.<sup>448</sup>

C. *Mixed Jurisdictions*:<sup>449</sup> I defined mixed jurisdictions to include jurisdictions that have: (a) rejected the traditional view that there are only some categories of legally adequate and inadequate provocation; and (b) adopted some, but not all, features of provocation law associated with the MPC’s reforms. As with the traditional jurisdictions, I chose two mixed jurisdictions: the “anchor” state based on the greatest number of intimate homicide search “hits” for jurisdictions estimated to be “mixed,” and the “supporting” state because it closely followed the legal rules of the “anchor” state. California was the anchor state and I chose Minnesota to complete the sample because it appeared to follow the mixture of rules adopted in California very closely and it produced a significant number of intimate homicide claims.<sup>450</sup> In both California and Minnesota, courts have rejected the categories and adopted a “reasonable person” rule for assessing provocation. Both jurisdictions have yielded cases in which courts have embraced the possibility of cumulative provocation, rejecting rigid application of a cooling period standard, a feature associated with “reform” of the defense. At the same time, each jurisdiction includes holdings that accept some rules associated with more traditional approaches such as the “third party rule”

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444. See *supra* note 88.

445. See *id.* (listing these jurisdictions).

446. See *supra* text accompanying notes 58–61 (describing common law categorical rules).

447. This was based on an estimate gleaned from treatise references of jurisdictions likely to continue to hold to traditional rules.

448. I make no claim that the “traditional” jurisdictions sampled here are representative of any jurisdiction other than one that adopts both the traditional criteria for excluding and including provocation claims. I estimate this to be a minority of jurisdictions in the United States.

449. In theory, almost every jurisdiction might be termed “mixed.” It was important, however, to find jurisdictions that followed similar legal rules, otherwise the point of the comparison might be lost. See *supra* text accompanying notes 107–08 & note 108.

450. It was important to achieve this kind of legal symmetry because “mixed” jurisdictions could in theory include quite disparate sets of provocation rules.



barring defendants from claiming provocation with respect to any person other than the provoking party.<sup>451</sup>

#### V. Statistical Notes Regarding Cross-Jurisdictional Comparisons

The data presented in Tables A and B were statistically tested to determine whether the estimated proportions of "separation" and "departure" were significantly different across jurisdictions. (The proportions were not the product of random differentiation.) A chi-square test on the difference of the proportions was conducted.<sup>452</sup> The results of this test indicate that the proportions are different. A chi-square test statistic of 9.01 for the separation figures and 12.57 for the departure figures was calculated (as compared to a chi-square statistic of 7.38 for a .025 significance level or 10.60 for a .005 significance level and two degrees of freedom). Thus we can be at least 97.5% confident that the proportions are not equal or the product of random differentiation.

TABLE F. FACTUAL SCENARIOS IN MPC DATA SET<sup>453</sup>

ELEMENT IN CASE	% OF ALL CLAIMS (100%); n=133	% OF CLAIMS WITH MALE DEFENDANTS (92%); n=122	% OF CLAIMS WITH FEMALE DEFENDANTS (8%); n=11
Separated Couples <sup>454</sup> 65% (86/133)	65% (86/133)	67% (82/122)	36% (4/11)
Infidelity 47% (63/133)	47% (63/133)	49% (60/122)	27% (3/11)
Physical Violence 17% (23/133)	17% (23/133)	12% (15/122)	73% (8/11)
Other 15% (20/133)	15% (20/133)	16% (20/122)	0% (0/0)

451. As I indicate above, I make no claim that the "mixed" jurisdiction data set is representative of jurisdictions adopting a "reasonable person" rule or jurisdictions that follow some "mixture" of common law and more modern rules.

452. See WILLIAM F. MATLACK, STATISTICS FOR PUBLIC POLICY AND MANAGEMENT 294-96 (1980) (setting forth chi-square test used in this analysis).

453. This table is based on the total number of cases in my MPC research, whether or not claims were ever heard by a jury. These figures do not add up to 100% because some cases involve more than a single factor.

454. This figure includes all of the claims classified as "separation," (80) plus the claims in which we know that the couple was separated at the time of the killing (9), with minor adjustments for one case in which there were multiple defendants and two refused-sex claims that were not properly classified as a "separated couple" (3). This number is actually greater than the number of "separation" claims because, in some cases, "separation" excludes cases of "separated couples." For example, if we do not know whether the "departure" was victim-initiated or if the "separation" was killer-initiated, the case will not be classified as "separation" but could involve a "separated couple."

## APPENDIX B: LIST OF CASES INCLUDED IN MPC DATA SET

The cases listed below form the basis of my research. Cases designated "I" are cases in which the trial jury received an EED instruction, as defined in Appendix A. Cases with no "I" designation are cases in which the trial jury was not instructed or in which the instruction remains "unknown." Cases designated "A" were appealed for failure to instruct on EED. Cases designated "F" involve female defendants. After the case citation appears the verdict reached in that trial, designated either as "murder" or "manslaughter."<sup>455</sup> The descriptions do not represent a summary of the courts' holdings in the cases cited, but summarize the information leading toward classification of the cases within my data set. Italicized material represents a summary of the "separation" evidence indicating that the *relationship had ended, was ending, or the victim sought to leave*.<sup>456</sup>

## I. DEPARTURE (33 Total; 26 I's)

1.I State v. Forrest, 578 A.2d 1066 (Conn. 1990); *Murder*

EED defense asserted and evidence presented in support. *See id.* at 1067. The victim sought to "terminate her relationship with the defendant, who had a history of psychological problems." *Id.* at 1067 (emphasis added). According to the defendant's testimony, the victim attended a party with the defendant and thereafter "told the defendant not to believe that they would get back together." *Id.* (emphasis added). As they were driving home, the defendant got angry, pulled a shotgun from the trunk, and killed. *See id.*

2.A State v. Thomas, 533 A.2d 553 (Conn. 1987); *Murder*

EED instruction denied. "Because of her deteriorating relationship with the defendant, the victim moved out of that apartment," and moved in with her parents. *Id.* at 555. There was evidence that the victim left because the defendant had threatened her with a knife. "On several occasions the defendant attempted to effect a reconciliation, but the victim rejected his efforts." *Id.* (emphasis added). The court found that defendant's "distraught" condition after the victim's appearance constituted insufficient evidence for defendant's EED claim. *See id.*

3.I State v. Utz, 513 A.2d 1191 (Conn. 1986); *Murder, Attempted Murder* (victim: wife's father)

EED instruction received with respect to both the murder of his father-in-law as well as the attempted murder of his brother-in-law.<sup>457</sup> *Defendant's wife had left him and moved into her brother's home.* *See id.* at 1192 (emphasis added). The defendant continued to pursue and call the victim, threatening to kill her if she contacted the police. *See id.* A week after the wife instituted divorce proceedings, the state police were notified of the defendant's actions. *See id.* A few days later, the

455. No effort has been made to distinguish between levels of murder verdicts. Effort has been made to identify the basis for manslaughter verdicts (whether EED or recklessness or some other basis). This information will appear in the case description or in the footnotes.

456. As indicated in Appendix A, the departure category includes cases in which the victim rejects an inchoate or casual relationship.

457. *See* Appendix to Brief for Defendant-Appellant at B-44, State v. Utz, 513 A.2d 1191 (Conn. 1986) (No. 12322) (quoting jury charge in which judge noted that EED was important to attempted murder charge as well as murder charge).

defendant arrived from Vermont, cut the telephone lines to the brother's home, pointed a rifle at the defendant's brother, who went to obtain a gun, and shot and killed the wife's father. *See id.* at 1192–93.

4.I State v. Utz, 513 A.2d 1191 (Conn. 1986); *Murder, Attempted Murder* (same case, different victim: brother-in-law)

5.I State v. Hinckley, 502 A.2d 388 (Conn. 1985); *Manslaughter*

Defendant convicted of EED manslaughter. Defendant drove to his former wife's place of employment and shot her. *See id.* at 389. At trial, defendant claimed insanity; evidence was presented showing that, *since the victim had obtained a divorce in 1976 (three years before the homicide), he had become despondent, angry, and obsessed* about continuing financial negotiations relating to the divorce and child support.<sup>458</sup>

6.I State v. Fair, 496 A.2d 461 (Conn. 1985); *Murder*

EED instruction received.<sup>459</sup> "The defendant and the victim lived together from June 1979 until December 1980," *id.* at 462, when the victim moved in with her mother.<sup>460</sup> She told the defendant that "*she was moving to Boston*" and that "*he would never see their son again.*" *Id.* (emphasis added). The next day, the defendant went to the victim's place of employment and shot her in the head. *See id.*

7.I Newell v. State, No. CR. A. IN 89-09-0419, 1990 WL 74310 (Del. Super. Ct. May 11, 1990), *aff'd*, No. 269, 1992 WL 53433 (Del. Mar. 4, 1992); *Murder*

EED instruction received.<sup>461</sup> The defendant had a history of domestic violence. *See id.* at \*1. On July 8, 1989, *defendant was arrested and was "ordered to have no further contact with his wife."* *Id.* (emphasis added). "Notwithstanding the foregoing order, Newell admitted that on August 30, 1989, he returned to his wife's home armed with a semi-automatic handgun," and killed his wife. *Id.* Defendant's EED theory depended in part upon a claim that his denial of the incident in the face of overwhelming evidence of his guilt suggested EED; hence, defendant stipulated to prior bad acts (battering) "to use that same evidence to buttress his defense of extreme emotional distress." *Id.* at \*3 & n.1.

8.I McGee v. State, No. 45, 1990 WL 254349 (Del. Dec. 11, 1990); *Murder*

EED instruction received.<sup>462</sup> "By 1988, due to the husband's drug use and his propensity to abuse his wife, the marriage deteriorated. As a result, Mrs. McGee was forced to leave the family home on several occasions." *Id.* at \*1. The parties attempted a reconciliation but defendant continued his abuse and, on the night of her death "*Mrs. McGee confided to a friend that she was afraid of McGee and was planning to leave him.*" *Id.* (emphasis added). The parties argued about the defendant's drug use and

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458. *See* Brief for Defendant-Appellant at 11, State v. Hinckley, 502 A.2d 388 (Conn. 1985) (No. 11351).

459. *See* Brief for Defendant-Appellant at 4, State v. Fair, 496 A.2d 461 (Conn. 1985) (No. 11457).

460. *See* Brief and Appendix of Appellee at 3, State v. Fair, 496 A.2d 461 (Conn. 1985) (No. 28186).

461. The opinion states that this instruction related to a second degree murder instruction, not manslaughter, although it is unclear why this should be so. *See* Newell v. State, No. 269, 1992 WL 53433, at \*\*2 (Del. Mar. 4, 1992).

462. The prosecution clearly argued the point to the jury. *See* McGee v. State, No. 45, 1990 WL 254349, at \*4 (Del. Dec. 11, 1990).

defendant killed his wife. *See id.* At trial, defendant claimed that "his wife's complaints about his drug use and his irresponsible behavior caused him stress" that resulted in the homicide. *Id.*

9.I Dickens v. State, 437 A.2d 159 (Del. 1981), *post-conviction relief denied by* 602 A.2d 95 (Del. Super. Ct. 1989), *aff'd*, 577 A.2d 752 (Del. 1990); *Murder; Attempted Murder*<sup>463</sup>

EED instruction received. *See* 602 A.2d at 97. On the day of the homicide, defendant entered the Wilmington bus station looking for his girlfriend who was trying to leave him. *See* 437 A.2d at 161. "Spotting Elmira and Myrti Handy . . . at the ticket window, *the defendant approached the pair and requested to speak with Elmira alone in order to dissuade her from leaving him.*" 602 A.2d at 95 (emphasis added). When her mother approached, the defendant fired the gun fatally wounding Elmira and injuring a bystander. *See id.* at 97.

10. Jones v. State, 902 P.2d 965 (Haw. 1995); *Murder*

EED claim denied at bench trial. *See id.* at 967. The defendant and victim had lived together for a number of years and had two children. *See id.* at 966. He claimed at bench trial that he was upset because the victim refused to speak to him about child visitation. *See id.* at 967. The prosecution put on evidence *showing that the victim was seeking to end the relationship and that Jones sought to reconcile with the victim*, calling and writing letters and talking to people about how he was going to get her back. *See id.*<sup>464</sup>

11. State v. Castro, 756 P.2d 1033 (Haw. 1988); *Attempted Murder*

Male defendant mounted an EED defense, *see id.* at 1040, and the jury was instructed on attempted manslaughter, *see id.* at 1038 n.1.<sup>465</sup> The defendant stabbed his *estranged* girlfriend, a dancer in a bar. *See id.* at 1038–39. *When the defendant entered the bar, the victim apprised her employer of her fear of the defendant. The employer told the defendant not to bother the victim.* *See id.* The defendant paid no heed and returned, leaped from his seat, grabbed her and said "let's go," stabbing her in the back and neck. *Id.* at 1039. The defendant testified that he could not stop, although he knew what was happening. *See id.* The victim testified to prior bad acts (the defendant's battering of her) which, on appeal, were found to be grounds for vacating the conviction and remanding for a new trial. *See id.* at 1041.

12. Sanborn v. Commonwealth, 892 S.W.2d 542 (Ky. 1995); *Murder*

EED instruction denied. *See id.* at 551. At his second trial, defendant conceded that he killed the victim and performed sex acts upon her but argued that he acted under "an extreme emotional disturbance." *Id.* at 546. The defendant's claim was based on what the appellate court dubbed "his own uncorroborated statements to [the expert witness] that *the victim refused his romantic advances and mocked his stuttering.*" *Id.* at 551 (emphasis added). The trial court refused to allow the expert to testify

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463. It appears that EED was interposed only with respect to the first degree murder charge. *See* Dickens v. State, 602 A.2d 95, 97 (Del. Super. Ct. 1989), *aff'd*, 577 A.2d 752 (Del. 1990).

464. The defendant's claim here (child visitation) depends upon the parties' separation. The prosecution's evidence shows that the victim sought to end the relationship. Hence, this case is classified as "departure." There was no claim of infidelity or physical violence.

465. Since it is unclear whether the attempted manslaughter instruction was based on EED (as opposed to recklessness or some other basis), the case is not classified as a "yes" instruction.

to this “triggering factor” because it was hearsay, a ruling affirmed on appeal. *Id.*

13.A Bowling v. Commonwealth, 873 S.W.2d 175 (Ky. 1994); *Murder*

EED instruction denied. *See id.* at 179. Defendant shot and killed two adults and wounded a child sitting in a parked car. *See id.* at 176. The evidence presented indicated that he was suffering because his “wife had left him,” he could not get a job, and had considered suicide. *Id.* at 177 (emphasis added). He argued that his bizarre behavior of the prior weekend (depression brought on because “Dottie Sue done left him again”), *id.* at 183 (Leibson, J., dissenting), and his striking of the victim’s car caused him to act uncontrollably, *see id.* at 179.<sup>466</sup>

14. Smith v. Commonwealth, 845 S.W.2d 534 (Ky. 1993); *Murder*

EED instruction unknown. *See id.* at 538.<sup>467</sup> Defendant was charged with murdering Pamela Wren by setting her apartment on fire. *See id.* at 535. Evidence at trial showed that Wren rejected and “spurned” defendant numerous times, that he had recently divorced for the third time, that his son had died, and that he had “turned to liquor and Wren for consolation when he realized his attempts at reconciliation with his third wife were futile.” *Id.* at 539 (emphasis added).

15.I Perry v. Commonwealth, 839 S.W.2d 268 (Ky. 1992); *Attempted Murder* (two counts) (victim: police officer)

EED instruction received in attempted murder prosecution with respect to both the police officer and defendant’s step-grandson. *See id.* at 271. Defendant had a restraining order issued against him at his marital residence, requiring him to vacate his home. *See id.* at 269. A deputy sheriff sought to execute the order. *See id.* Upon leaving the house, the defendant fired five shots at the officer and then tried to run him over with his car. *See id.* at 269–70. The defendant claimed at trial that he was upset by the service of the order and having to leave his home.<sup>468</sup> After he attacked the sheriff executing the order he sought out his wife and, in the process, attacked his step-grandson. *See id.* at 270.<sup>469</sup>

16.I Perry v. Commonwealth, 839 S.W.2d 268 (Ky. 1992); *Attempted Murder* (same case, different victim: step-grandson)

17.I Smith v. Commonwealth, 734 S.W.2d 437 (Ky. 1987); *Murder* (victim: girlfriend)

EED instruction received with respect to all four victims. *See id.* at 449. “Smith grew despondent over news that his girlfriend was leaving him.” *Id.* at 440 (emphasis added). The girlfriend left with their child “to live with her mother” in Ohio. *Id.* She returned to Kentucky for her belongings and defendant

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466. That the defendant asserted other reasons, along with the departure or separation, does not eliminate the case from this category. Only if the reasons include “infidelity” or “physical violence” would these “other reasons” cause a shift to another category.

467. The defendant presented this evidence at the guilt stage of the trial. The case is not designated as an “I” instruction because it is unclear whether the defendant obtained an instruction at that phase, as opposed to the penalty phase of his death penalty trial.

468. *See* Brief for Appellant at 9–10, Perry v. Commonwealth, 839 S.W.2d 268 (Ky. 1992) (No. 91-SC-93-MR).

469. The brief for the appellants indicates that the stepdaughter obtained the protective order because the defendant refused to leave the house and because his wife, who was dying of cancer, feared him. *See id.* app. at A-7.

arrived at her family's home. *See id.* After a brief argument with the girlfriend, he retrieved a gun from the hedge and killed the girlfriend, her infant daughter, her half-sister, and her mother. *See id.*<sup>470</sup>

18.I Smith v. Commonwealth, 734 S.W.2d 437 (Ky. 1987); *Murder* (same case, different victim: infant daughter)

19.I Smith v. Commonwealth, 734 S.W.2d 437 (Ky. 1987); *Murder* (same case, different victim: half-sister)

20.I Smith v. Commonwealth, 734 S.W.2d 437 (Ky. 1987); *Murder* (same case, different victim: mother)

21.I Matthews v. Commonwealth, 709 S.W.2d 414 (Ky. 1985); *Murder* (two counts) (victim: wife)  
EED instruction received with respect to killing both wife and mother-in-law.<sup>471</sup> Defendant and his wife had undergone repeated separations. *See id.* at 417. "These separations were marked by extreme hostility, and Marlene often swore out criminal warrants against her husband for harassment." *Id.* At the time of the killing, he was under court order to stay away from his estranged wife's home. *See id.* To establish EED, "appellant relied on . . . testimony . . . about the long history of significant marital strife," *id.*, including "the supposedly unjustified bringing of warrants to explain his emotional state," *id.* at 418. On the night of the homicide, he broke into his wife's home, and killed his mother-in-law and his wife.

22.I Matthews v. Commonwealth, 709 S.W.2d 414 (Ky. 1985); *Murder* (same case, different victim: mother-in-law).

23.I State v. Little, 462 A.2d 117 (N.H. 1983); *Murder*  
EED instruction received. *See id.* at 118 Defendant and his wife had been living apart for several weeks. "During this period, the defendant visited his estranged wife nearly every day in an attempt to effect a reconciliation." *Id.* (emphasis added). There was evidence that he had made threats to kill her and said to a friend that, "If I can't have her nobody's going to have her." *Id.* The defendant testified that he "awakened with the intent of killing his wife," went to her house, went to look for his wedding band, and when his wife said, "You think you can go into any room in my house," his mind snapped and he stabbed her to death. *Id.*

24.I People v. Fardan, 592 N.Y.S.2d 162 (App. Div. 1992), *aff'd*, 628 N.E.2d 41 (N.Y. 1993); *Murder*

EED instruction received. *See* 628 N.E.2d at 42.<sup>472</sup> "Defendant testified that early in the afternoon

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470. The defendant argued that he killed his wife and the three others because of EED; he was convicted of killing the other three persons by transferred intent. *See* Smith v. Commonwealth, 734 S.W.2d 437, 446 (Ky. 1987).

471. *See* Brief for Appellant at 31, Matthews v. Commonwealth, 709 S.W.2d 414 (Ky. 1985) (No. 83-SC-348-MR).

472. On appeal, defendant argued that EED was a defense to depraved heart murder, an argument the appellate court rejected. *See* People v. Fardan, 628 N.E.2d 41, 43-44 (N.Y. 1993).

Ms. Cox promised to have sex with him but when defendant later pressed his demand . . . *Ms. Cox refused.*" *Id.* (emphasis added). An argument ensued and in a fit of anger, defendant stabbed her to death. *See id.*

25. *People v. Casassa*, 404 N.E.2d 1310 (N.Y. 1980); *Murder*

EED claim denied at bench trial. *See id.* at 1313. The victim "informed defendant that she was not 'falling in love' with him. . . . *Miss Lo Consolo's rejection of defendant's advances . . . precipitated a bizarre series of actions on the part of defendant which, he asserts, demonstrate*" EED. *Id.* at 1312 (emphasis added). On appeal, the New York Court of Appeals decided against the defendant's EED claim. *See id.* at 1313–17.

26.I *People v. Benedict*, 609 N.Y.S.2d 100 (App. Div. 1994); *Murder*

EED instruction received. *See id.* at 101. The defendant explained at trial "that *he had been arguing with his wife over her suggestion that they separate*. He maintained that her remark that he 'made her skin crawl' made him so angry and caused such emotional hurt that he lost control of himself." *Id.* (emphasis added).

27.I *People v. Wood*, 568 N.Y.S.2d 651 (App. Div. 1991), *aff'd*, 591 N.E.2d 1178 (N.Y. 1992); *Murder*

EED instruction received. *See id.* at 653. "At his second trial, the defendant's defense was that he had 'snapped' and was 'totally out of control' at the time of the killing because of an [EED] triggered by his *dissatisfaction with the victim who reportedly turned her back on him and went to sleep after they engaged in sexual intercourse.*" *Id.* at 652 (emphasis added). Defendant sought to explain this action by reference to various psychological disorders. *See id.*<sup>473</sup>

28.IF *People v. Ambrose*, 553 N.Y.S.2d 896 (App. Div. 1990); *Manslaughter*

EED instruction received. *See id.* at 897. The victim argued that she killed in self-defense because the defendant had physically abused her in the past, had threatened her baby, and she was afraid he would hurt the baby. *See id.* at 896.<sup>474</sup> Based on evidence submitted by the prosecution, *the jury found that she killed the defendant in his sleep "because she was upset over his plans to leave her."* *Id.* at 897 (emphasis added).

29.I *People v. Guevara*, 521 N.Y.S.2d 292 (App. Div. 1987); *Murder*

EED instruction received. *See id.* at 294. "[T]he defendant and his wife argued . . . about her intent to institute a divorce proceeding. During the argument, the defendant left the room, obtained a two-foot-long wooden board and returned to beat his wife about the face and neck." *Id.* at 293 (emphasis added). "The defendant then searched the room for the divorce papers, found them, fled through the bedroom window, and returned to his girlfriend's apartment . . . ." *Id.* Defendant testified at trial that he "lost

473. Note that the "departure" category includes acts of "rejection." *See* Appendix A.

474. The case reports that the jury's finding was based on leaving alone. *See People v. Ambrose*, 553 N.Y.S.2d 896, 897 (App. Div. 1990). Hence, the case is classified as "departure," despite the victim's own claims of physical violence. If classifying the case as such is an error, it is one that operates against my thesis since this is a female defendant.

control because he was confused about the divorce." *Id.* On appeal, the court expressed skepticism that defendant's claim of "stress" was severe and indicated that the defendant's excuse was not "reasonable under the circumstances."<sup>475</sup> *Id.* at 294.

30.I State v. Dilger, 338 N.W.2d 87 (N.D. 1983); *Murder*

EED instruction received. *See id.* at 93 n.2. The defendant and victim shared an apartment next to a bar. *See id.* at 88. "After an argument occurred between [the defendant] and [the victim], [the victim] left and returned a few minutes later with clothing and other items belonging to Dilger. After making two trips carrying items belonging to [the defendant], [the victim] left the bar." *Id.* (emphasis added). "Persons in the bar began teasing [the defendant] about having to sleep in the bar's kitchen." *Id.* Defendant left and returned fifteen minutes later, having killed the victim. *See id.*

31.I State v. Wille, 858 P.2d 128 (Or. 1993), *aff'g* 839 P.2d 712 (Or. Ct. App. 1992); *Murder*

EED instruction received. *See id.* at 130–31. "Defendant was very upset that his wife had filed for a dissolution. She was living with her mother and had obtained a temporary restraining order preventing him from entering her residence. After she filed the dissolution action, defendant told a number of people that he wanted to kill her." 839 P.2d at 713 (emphasis added). On the day of the homicide, the defendant kicked the door in, saying "'this is it,'" and stabbed his wife. *Id.* at 714. Defendant's expert testified at trial that his "impending divorce" and financial problems presented an extremely stressful situation. 858 P.2d at 134.

32.I State v. Reams, 636 P.2d 913 (Or. 1981), *aff'g* 616 P.2d 498 (Or. Ct. App. 1980); *Murder, Attempted Murder*<sup>476</sup>

EED instruction received.<sup>477</sup> "The defendant and his wife had a stormy marriage." *Id.* at 914. One day, "defendant returned from work to find that the furniture of the house had been 'cleaned out.'" Without telling the defendant, his wife had secretly rented another house and had arranged with a 'mover' to move the furniture there." *Id.* (emphasis added). Defendant appeared at his in-laws' home intending to scare his wife. *See id.* He shot and killed his father-in-law and wounded his mother-in-law. *See id.*

33.I State v. Price, 909 P.2d 256 (Utah Ct. App. 1995), *cert. denied*, 916 P.2d 909 (Utah 1996); *Murder*

EED instruction received. *See id.* at 262. The defendant and victim had lived together for two years and had a child. *See id.* at 258. "However, their relationship ended when [the victim] moved to Ogden

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475. This ruling was made in the context of deciding defendant's claim of insufficient evidence of intentional homicide. *See* People v. Guevara, 521 N.Y.S.2d 292, 294 (App. Div. 1987). The appellate court did not hold that the jury should not have been instructed on EED. *See id.*

476. Defendant pled guilty to the attempted murder charge and therefore EED was not an issue with respect to that count. *See* State v. Reams, 636 P.2d 913, 914 n.1 (Or. 1981).

477. Excerpts from the trial transcript indicate that the EED instruction was given, albeit only with respect to the intentional murder, rather than the felony murder, charge. *See* Appellant's Brief at 20, State v. Reams, 636 P.2d 913 (Or. 1981) (No. 16280) (quoting jury charge: "In this case, the issue of extreme emotional disturbance applies only to the charge of intentional murder, or of manslaughter in the first degree."). Defendant argued unsuccessfully on appeal that EED was also a defense to felony murder. *See* Reams, 636 P.2d at 920–21.



*about two months before her murder.*" *Id.* (emphasis added).<sup>478</sup> Defendant drove to the victim's apartment, started yelling at her and killed her. *See id.*<sup>479</sup> Defendant claimed that he was frustrated and "tired of her hurting me." *Id.* at 263.

## II. SEPARATION AND INFIDELITY (42 Total; 37 I's)

34. Starling v. State, 786 S.W.2d 114 (Ark. 1990); *Murder*

Defendant sought to rely upon an EED defense. *See id.* at 116.<sup>480</sup> "[O]n July 5, 1988, his wife and daughter, Christina, left the marital home. Appellant had a neighbor deliver a letter to his wife hoping she would either return home or meet with him to discuss their problems. She refused." *Id.* at 115 (emphasis added). Three days later, defendant shot his wife after a heated conversation. *See id.* The wife's friend testified that the defendant had claimed that his wife was unfaithful. *See id.* at 117.

35.I State v. Rivera, 612 A.2d 749 (Conn. 1992); *Murder*

EED instruction received. *See id.* at 751. *Three years after he moved out of the home he shared with his common law wife*, the defendant returned to her apartment because *he believed that she was seeing someone else*, *see id.* at 750, and had been told that the new man was "more man" than him.<sup>481</sup> Defendant broke into the apartment and stabbed the rival. *See id.* at 750–51.

36.I State v. Traficonda, 612 A.2d 45 (Conn. 1992), *post-conviction relief denied sub nom.* Traficonda v. Warden, No. 1543S, 1996 WL 753879 (Conn. Super. Ct. Dec. 26, 1996); *Murder*

EED instruction received. *See id.* at 46 & n.2. Defendant claimed he killed his wife accidentally, *see id.* at 46, but argued EED, *see id.* at 48–49, based on evidence at trial showing that the parties had argued the night of the shooting and that there was a history of "marital strife," including documented "mental and physical abuse of the victim," *id.* at 47. Two days before the shooting, the victim consulted an attorney about the abuse and how to retain custody of her child *if she sought a divorce*. *See id.* On the evening of the shooting, the victim left her home and went to a neighbor's telling her that *she could not take it anymore and had to leave*.<sup>482</sup> The briefs indicate that the defendant had accused the victim of "cheating on him" in the past.<sup>483</sup>

478. There was evidence presented at trial that the victim was physically abused by the defendant. One witness stated that defendant had kicked the victim "Ninja style" when pregnant. *See* State v. Price, 909 P.2d 256, 265 n.13 (Utah Ct. App. 1995), *cert. denied*, 916 P.2d 909 (Utah 1996).

479. The victim had gone to the movies with "Tony Hairston," who was outside waiting in the car when the shooting occurred. There is no indication whether the victim had a romantic relationship with Hairston or that defendant's EED claim was based on a romantic rivalry. *See id.* at 258.

480. It is unclear whether an EED instruction was given. *See* Starling v. State, 786 S.W.2d 114, 116 (Ark. 1990).

481. *See* Brief for Defendant-Appellant at 16, State v. Rivera, 612 A.2d 749 (Conn. 1992) (No. 14532).

482. *See* Brief for State of Connecticut-Appellee at 6, State v. Traficonda, 612 A.2d 45 (Conn. 1992) (No. 14310).

483. Brief for Defendant-Appellant at 6, State v. Traficonda, 612 A.2d 45 (Conn. 1992) (No. 14310).

37.I State v. Chicano, 584 A.2d 425 (Conn. 1990);<sup>484</sup> *Manslaughter, Murder*<sup>485</sup> (victim: rival)

Defendant convicted at bench trial of three counts of felony murder and three counts of EED manslaughter. *See id.* at 427. "*The defendant and Ellen Babbit had been involved in a romantic relationship that had deteriorated by the end of 1986.*" *Id.* at 428 (emphasis added). Defendant went to see Babbit at her home. While outside, he overheard the sounds of sexual activity. *See id.* He then hid, eventually moving to the bedroom where he hit his rival on the head with a crowbar. *See id.* When the victim sought to protect her boyfriend, the defendant became enraged and killed his rival, his ex-girlfriend's son, and his girlfriend. *See id.*

38.I State v. Chicano, 584 A.2d 425 (Conn. 1990); *Manslaughter, Murder* (same case, different victim: ex-girlfriend's son)

39.I State v. Chicano, 584 A.2d 425 (Conn. 1990); *Manslaughter, Murder* (same case, different victim: ex-girlfriend)

40.I State v. Wood, 545 A.2d 1026 (Conn. 1988); *Murder* (four counts) (victim: former wife)

EED instruction received with respect to all four victims.<sup>486</sup> "[D]efendant's claim of extreme emotional disturbance centered principally on his relationship with his former wife and the mental and emotional turmoil that grew out of the breakdown of that relationship." *Id.* at 1030. *His former wife had dissolved the marriage largely because she believed that the defendant was sexually abusing their daughter.* *See id.* He admitted that he made one advance that he claimed was rebuffed. *See id.* On the day of the homicide, the defendant killed his former wife and her new boyfriend and then murdered his ex-mother-in-law and his daughter. *See id.* at 1028. His psychiatrist testified that he had an "extreme emotional reaction" to the loss of his ex-wife Rosa,<sup>487</sup> and that "[d]efendant's rage at Rosa was the key to all of the homicides." *Id.*<sup>488</sup>

41.I State v. Wood, 545 A.2d 1026 (Conn. 1988); *Murder* (same case, different victim: new boyfriend)

42.I State v. Wood, 545 A.2d 1026 (Conn. 1988); *Murder* (same case, different victim: daughter)

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484. This case is classified as "instruction" because the trial court returned manslaughter verdicts with respect to all three victims. *See* State v. Chicano, 584 A.2d 425, 427 (Conn. 1990).

485. The three-judge panel convicted the defendant of murder and EED manslaughter for the same crimes, which created a double jeopardy issue. *See id.*

486. *See* Brief for Defendant-Appellant at 33, State v. Wood, 545 A.2d 1026 (Conn. 1988) (No. 12734); *see also* Brief for State of Connecticut at B-1, State v. Wood, 545 A.2d 1026 (Conn. 1988) (No. 12734) (quoting jury charge as providing that "the ultimate determination of the presence or absence of extreme emotional disturbance is one of fact for the members of the jury").

487. Brief for Defendant-Appellant at 15, *Wood* (No. 12734).

488. There is some indication that the defendant claimed that he struggled with the boyfriend before he shot. However, this does not appear to be the basis for the EED claim. The EED argument was based on defendant's belief that his "ex-wife" had "betrayed" him "when she followed through with the divorce." *See* Brief for State of Connecticut at 19, *Wood* (No. 12734); *accord* Brief for Defendant-Appellant at 14-15, *Wood* (No. 12734).

43.I State v. Wood, 545 A.2d 1026 (Conn. 1988); *Murder* (same case, different victim: former mother-in-law)

44.I State v. Hull, 556 A.2d 154 (Conn. 1989); *Murder*

EED instruction received. *See id.* at 157. “In May, 1985, the victim filed for divorce and a restraining order was issued against the defendant.” *Id.* (emphasis added). After leaving a suicide note, the defendant pursued his estranged wife and called her. *See id.* She reiterated that she wanted to end their relationship. *See id.* The defendant traveled to her new home, the victim emphasized her desire to leave, and defendant stabbed her after a scuffle. *See id.* At trial, some evidence indicated that the defendant believed that the victim had returned to her ex-husband, an allegation the victim appeared to deny.<sup>489</sup>

45. State v. Ricketts, 659 A.2d 188 (Conn. App. Ct. 1995); *Murder*

EED claim denied at bench trial. *See id.* at 190. The defendant lived with the victim for three years and they had a child together. *See id.* at 189. “In early 1991, the defendant’s relationship with the victim began to deteriorate as a result of the defendant’s drug use, and the defendant moved into an apartment across the street.” *Id.* (emphasis added). In July, the victim began a friendship with another man. *See id.* He arrived to visit and the defendant burst through the door, stabbing the victim and the other man because he believed they had just engaged in sexual intercourse. *See id.* at 190.

46.I State v. Burgos, 656 A.2d 238 (Conn. App. Ct.), *cert. denied*, 659 A.2d 186 (Conn. 1995); *Murder*

EED instruction received. *See id.* at 242. During the summer of 1991, the defendant discovered that the victim was having an affair, they argued, she asked him to leave, and he moved into his mother’s apartment. *See id.* at 239. In September, the parties attempted to reconcile but they argued about the victim’s infidelity and the victim allegedly insulted the defendant. *See id.* Defendant became angry, left the house, returned later that night and asked the victim to sleep with him; the victim refused and told him she was leaving him. *See id.* at 240. The defendant replied that he would kill her “before he let her go anywhere.” *Id.* She died of severe blows to the head and stab wounds. *See id.*

47.I State v. Martinez, 591 A.2d 155 (Conn. App. Ct. 1991); *Manslaughter*

Defendant presented evidence to establish an EED defense, but manslaughter verdict was based on “intent to cause serious physical injury to another person,” rather than EED. *Id.* at 156. “Two weeks before the victim’s death, the defendant, the victim’s former boyfriend, had seen the victim dancing with another man.” *Id.* (emphasis added). The defendant lingered in the area of her apartment for two days prior to the incident, and then “accosted the victim at the door of her apartment” and shot her. *Id.*

48.A Jones v. State, No. 253, 1992 WL 115150 (Del. May 7, 1992); *Murder*

EED claim denied at bench trial. *See id.* at \*\*2. Victoria Bell was in a romantic relationship with

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489. An oblique reference to this aspect of the case appears at *State v. Hull*, 556 A.2d 154, 165 (Conn. 1989). The briefs indicate that defendant’s jealousy about the alleged ex-husband was part of the EED claim. *See* Brief for State of Connecticut at 34, *State v. Hull*, 556 A.2d 154 (Conn. 1989) (No. 13189).

the defendant that lasted "nearly eleven years. . . . In 1989, however, Bell moved out of the residence she had shared with Jones, and moved, along with her three children, into her mother's house . . . ." *Id.* at \*\*1 (emphasis added). "Bell subsequently became romantically involved with Jerry Roberts . . . . Bell testified that when Jones became aware of her new relationship with Roberts, Jones became very angry, told Bell that he did not want Roberts near his children, and threatened to harm both Bell and Roberts." *Id.* The court found insufficient evidence to send the case to the jury on EED. *See id.* at \*\*2.

49.I State v. Rodebaugh, No. 436, 1990 WL 254365 (Del. Nov. 27, 1990); *Murder*

EED instruction received. *See id.* at \*\*1. "At the time of the killing, the victim had been dating a woman whom defendant had dated for a short time a year and a half earlier, and whom defendant had continued to pursue, against her wishes." *Id.* (emphasis added). Defendant confronted his rival outside his apartment, an argument ensued, and the defendant shot the victim four times. *See id.* at \*\*2.

50.I Re v. State, 540 A.2d 423 (Del. 1988), *post-conviction relief denied by* Crim. A. Nos. IN76-07-0016, -0017, -0019, 1994 WL 89020 (Del. Super. Ct. Mar. 2, 1994), *aff'd*, No. 104, 1995 WL 67087 (Del. Feb. 10, 1995); *Murder*

EED instruction received. *See id.* at 427. *Defendant's marriage to the victim "had been both short and bitter.* On the night he killed his wife Re went to the house where she was staying and waited for her to return. *Eventually, she arrived accompanied by an off-duty police officer as her date."* *Id.* at 425 (emphasis added). An argument ensued, which ended with defendant killing his wife. *See id.*

51.I Davis v. State, 522 A.2d 342 (Del. 1987); *Murder*

EED instruction received. *See id.* at 346. Defendant and his wife "had a tempestuous marriage with the parties often separating and reconciling. On April 1, 1985, Davis, who was then separated from his wife, called his wife and threatened to kill her and her boyfriend Baird, with a gun." *Id.* at 342 (emphasis added). Defendant claimed at trial that he killed her "because of his history of jealousy, 'runaways,' and rejection." *Id.* at 343.

52.I Casalvera v. State, 410 A.2d 1369 (Del. 1980); *Murder*

Defendant relied upon EED defense at trial and court found that evidence was admitted properly under an EED theory. *See id.* at 1373.<sup>490</sup> The defendant had gone to Georgia but, upon his return, found that "[t]he victim was beginning to lose her feelings for the defendant. *She made it clear that she did not want him to return from Georgia for her sake alone. She had begun to go out with other men, and she told the defendant that things were different."* *Id.* at 1371 (emphasis added). He nevertheless returned hoping to continue the relationship. *See id.* Eventually, she told him that things had changed and she had slept with another man. *See id.* at 1372. This enraged the defendant and he killed her. *See id.*

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490. The case is classified as a "yes" instruction because evidence could not have been properly admitted if the defendant's theory did not reach the jury.

53.I Delaware v. Steedley, No. IK90-06-0183R1, 1994 WL 750302 (Del. Super. Ct. Dec. 8, 1994), *aff'd*, 670 A.2d 1340 (Del. 1995); *Murder, Attempted Murder*<sup>491</sup>

EED instruction received. *See id.* at \*10. Six months after filing for divorce, the defendant and his wife “made an attempt to reconcile,” but the defendant became abusive, eventually pouring boiling grits on his wife. *Id.* at \*2. *She decided to have no further dealings with him and the divorce was finalized. Id.* Defendant based his EED claim for the killing of his wife on “his discovery of his wife’s affair with his best friend.” *Id.* at \*10.

54.I State v. Maelega, 907 P.2d 758 (Haw. 1995); *Murder*<sup>492</sup>

EED instruction received. *See id.* at 762. Evidence at trial showed that the defendant had abused his wife, who had recently had a baby.<sup>493</sup> Defendant claimed that he was suffering from EED because he believed that his wife was having “sexual relations with her stepfather.” *Id.* at 761. The victim had earlier claimed that she had been raped by her stepfather, but recanted upon the stepfather’s denial, admitting that “she had made up the story because she was afraid and tired of being beaten up by her husband.” *Id.* at 760. On the evening before the homicide, the victim and defendant refused to sleep in separate apartments but *the victim told defendant “that he should return to American Samoa.” Id.* (emphasis added).<sup>494</sup> Defendant awoke the next morning, decided his wife had just had sex with his stepfather because she was “sweaty,” and strangled her. *See id.* at 761.

55.I State v. Matias, 840 P.2d 374 (Haw. 1992); *Murder*

EED instruction received. *See id.* at 377. According to evidence the defendant introduced, he and the victim had been lovers for several years prior to the killing. *See id.* at 376. The defendant claimed EED based on the fact that, “[i]n the months immediately preceding the killing, [the victim] had been in the process of breaking off the relationship, and she had also started a separate relationship with another man, a fact known to [defendant].” *Id.* (emphasis added).

56.FI State v. Samuel, 838 P.2d 1374 (Haw. 1992); *Murder*

EED instruction received. *See id.* at 1382. “[Defendant and victim] were lovers for two years while they were inmates” at a Hawaii correctional institution. *Id.* at 1376. “*Their relationship terminated after [the victim] was released from incarceration. In 1989, [the victim] returned to prison and [defendant] attempted to renew the relationship, but [the victim] refused.*” *Id.* (emphasis added). On the day before the stabbing, the defendant asked the victim to spend the evening and the victim refused. *See id.* The next day, the defendant fatally stabbed the victim. *See id.* at 1377.

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491. There is conflicting evidence in the opinion as to whether EED was raised with respect to the attempted murder charge. *See* State v. Steedley, No. IK90-06-0183R1, 1994 WL 750302 at 10 (Del. Super. Ct. Dec. 8, 1994). The case is therefore classified as a single claim.

492. The case was reversed and remanded for a new trial because the EED instruction given may have impermissibly shifted the burden of proof, in the jurors’ minds, to the defendant. *See* State v. Maelega, 907 P.2d 758, 762–65, 770 (Haw. 1995).

493. The evidence included testimony by a nurse that defendant had “beat up Eyvette in the Labor & Delivery Room of the hospital.” *Id.* at 761 n.3. When asked “why,” he responded “that in Samoa it’s okay for them to beat up their wives and their children for obedience.” *Id.*

494. The prosecution introduced testimony suggesting that the violence occurred when the victim “attempted to either leave the relationship or enlist the aid of others in dealing with her abusive husband.” *Id.* The precise nature of the efforts to leave is unclear, however, from the face of the opinion.

57. Hunter v. Commonwealth, 869 S.W.2d 719 (Ky. 1994); *Murder*

EED instruction denied at guilt phase of trial.<sup>495</sup> The victim, the defendant's wife, died in a fire. *See id.* at 720. "[T]here was evidence of the couple's turbulent relationship, accounts of infidelities, *the victim's plans to seek an annulment*, and a volatile argument the night of the fire." *Id.* (emphasis added). "Testimony at trial portrayed a disturbed young man involved in a five-week marriage that suffered from numerous separations and regular infidelities on the victim's part." *Id.* at 726.

58.I McClellan v. Commonwealth, 715 S.W.2d 464 (Ky. 1986); *Murder*

EED instruction received. *See id.* at 467, 469. Defendant was the fifth husband of Bernadette McClellan. *See id.* at 466. *She separated from defendant when he threatened her with a knife and moved back in with her third husband.* *See id.* The defendant tried to persuade Bernadette to return. *See id.* One day, he forced his way into her apartment. *See id.* When Bernadette emerged unclothed, he killed her third husband and kidnapped her. *See id.*

59.I People v. Berk, 629 N.Y.S.2d 588 (App. Div. 1995), *aff'd*, 667 N.E.2d 308 (N.Y. 1996); *Murder*

EED instruction received. *See id.* at 590. *The defendant and his wife were no longer living together, and she had filed for divorce.* *See* 667 N.E.2d at 309.<sup>496</sup> When he came upon her and her lover engaged in sexual activity, he shot the man and claimed at trial that the rival had attacked him. *See id.* A taped 911 call indicated that the wife had fled the bedroom to call for help. *See id.* The defendant followed and shot her while she pleaded for her life. *See id.* The jury rejected the EED defense, convicting the defendant of manslaughter for the killing of his estranged wife's lover and second degree murder for the killing of his wife. *See* 629 N.Y.S.2d at 590.

60.I People v. Checo, 599 N.Y.S.2d 244 (App. Div. 1993); *Murder*

EED instruction received. *See id.* at 244.<sup>497</sup> "Defendant's own testimony indicated that while at the time in question *he had been estranged from the victim, his former wife, for some time*, and had been experiencing business difficulties, these circumstances were not unusual." *Id.* (emphasis added). The court therefore found that defendant's "explanation that he experienced 'emotion' and 'jealousy' at the mere sight of his *former wife in the company of another man*, did not provide a 'reasonable explanation or excuse.'" *Id.* (emphasis added).

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495. This case reversed defendant's conviction because the trial court failed to provide EED as a mitigating factor in the death penalty phase of defendant's murder trial, but makes clear that the trial court was right to refuse an EED instruction at the guilt phase. *See* Hunter v. Commonwealth, 869 S.W.2d 719, 726 (Ky. 1994) ("[W]e agree with the trial judge that the evidence did not warrant a guilt-phase instruction on extreme mental or emotional disturbance under KRS 507.020(1)(a).").

496. Apparently, the defendant testified that immediately prior to the killing and sometime after midnight he had talked to his wife and "[d]uring the conversation, his wife assured him that she was not having an affair with Valvo," that "she needed some time to think about their marriage," and they arranged to meet on the weekend. People v. Berk, 667 N.E.2d 308, 309 (N.Y. 1996). This does not negate the separation classification since there is also evidence that the victim had filed for divorce and the parties were living apart. *See* Appendix A (noting that "some" evidence is standard for classification as separation).

497. The jury rejected the defense and on appeal the court concluded that "[d]efendant failed to prove, by a preponderance of the evidence, that he acted herein under" EED. People v. Checo, 599 N.Y.S.2d 244, 244 (App. Div. 1993).

61.I      *People v. Hartsock*, 592 N.Y.S.2d 511 (App. Div. 1993); *Attempted Murder*

EED instruction received. *See id.* at 511–12.<sup>498</sup> “*In the course of an argument, during which the victim refused to reconcile with defendant and insisted that it was over between them*, defendant shouted ‘[I]f I can’t have you nobody else [will],’” fired three shots, and shot himself in the stomach. *Id.* at 511 (emphasis added) (second alteration in the original). Defendant claimed that he was “hurt and upset because his wife would not reconcile with him, and because she told him that she was sleeping with other men.” *Id.* Both survived and defendant was convicted of attempted murder. *See id.*

62.I      *People v. Fisher*, 576 N.Y.S.2d 603 (App. Div. 1991); *Murder*

EED instruction received. *See id.* at 604. The defendant “attempted to establish that he acted under the influence of extreme emotional disturbance at the time he killed his *ex-wife*, [but] the People presented evidence, corroborated by the defendant’s own testimony, that *the defendant was an angry and jealous exhusband who had previously threatened to kill the victim.*” *Id.* (emphasis added).

63.A      *People v. White*, 564 N.Y.S.2d 314 (App. Div. 1991), *aff’d*, 590 N.E.2d 236 (N.Y. 1992); *Murder*

EED instruction denied. *See* 590 N.E.2d at 237. Shortly before the homicide, the victim, the defendant’s wife, had the defendant arrested for breaking her leg. *See* 564 N.Y.S.2d at 315. The defendant claimed that he had acted in self-defense and that she had him arrested because he had refused to buy her drugs. *See id.* “*Released the following day, defendant returned to the home in violation of an order of protection.*” *Id.* (emphasis added).<sup>499</sup> He killed the victim later and based his EED claim on her taunts about infidelities made three weeks earlier. *See id.* at 317. On appeal, the court found that “defendant may have met his burden with respect to the first element of the . . . defense by evidence of a violent and tumultuous relationship with his wife,” 590 N.E.2d at 238, but that the evidence of provocative acts were too remote in time, *see id.*

64.I      *People v. Olmstead*, 521 N.Y.S.2d 192 (App. Div. 1987); *Attempted Manslaughter*

EED manslaughter verdict returned. *See id.* at 193. “Defendant and the victim . . . were married in December 1984 and separated in March 1985. At that time, defendant was upset because [*the victim*] *apparently wanted an annulment* and because defendant believed she was having an affair with another man.” *Id.* (emphasis added). The jury found defendant guilty only of attempted first degree manslaughter. *See id.*

65.I      *People v. Maggio*, 494 N.Y.S.2d 424 (App. Div. 1985); *Manslaughter*

Defendant pled guilty to first degree manslaughter based on EED. *See id.* at 425. The defendant and his wife had a “*history of separations and reconciliations.*” *Id.* (emphasis added). While attempting another reconciliation, defendant learned from *his wife that she had spent “the previous five nights with another man,”* and she laughed when defendant expressed doubt about the paternity of his second child. *Id.* (emphasis added). Enraged, he repeatedly stabbed his estranged wife with a knife. *See id.*

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498. The defendant appealed the “jury’s rejection of his affirmative [EED] defense.” *People v. Hartsock*, 592 N.Y.S.2d 511, 511 (App. Div. 1993).

499. This factor puts the case in the “separation and infidelity” category.

- 66.I      *People v. Fediuk*, 480 N.Y.S.2d 913 (App. Div. 1984), *aff'd*, 489 N.E.2d 732 (N.Y. 1985); *Murder*

Defendant argued EED and the issue was "closely contested" at trial. *Id.* at 913.<sup>500</sup> "*Five months after separating from his wife and their two children, during which time she lived in a battered women's shelter and told defendant that she no longer loved him, defendant learned that his wife had been seeing another man . . .*" 489 N.E.2d at 733 (emphasis added). "*Prior to the shooting, defendant's wife had obtained an order of protection . . . At the time of their separation, Mrs. Fediuk made it clear to defendant that she no longer loved him and that there was no possibility of reconciliation.*" 480 N.Y.S.2d at 915 (Weinstein, J., dissenting) (emphasis added). Defendant threatened his wife and killed her boyfriend. *See id.* at 914–15 (Weinstein, J., dissenting). On appeal, one justice concluded that the defendant's verdict should be reduced to EED manslaughter based on the "long-term overwhelming stress caused by the rejection and unfaithfulness of his wife." *Id.* at 914 (Weinstein, J., dissenting).

- 67.I      *State v. Huber*, 361 N.W.2d 236 (N.D. 1985); *Murder, Attempted Murder*<sup>501</sup> (victim: estranged wife)

EED instruction received with respect to estranged wife, estranged wife's alleged lover, wife of lover, and wife's sister-in-law. *See id.* at 239 & n.1. Defendant was upset about an "*impending divorce between defendant and his wife.*" *Id.* at 241 (emphasis added). He "believed that his wife, Gladys, was having an affair with . . . her boss at the bank where she worked." *Id.* Evidence was presented showing that the defendant believed that the boss's wife knew about the affair and because of that knowledge had to be "terminated." *Id.* He was also angry with his brother-in-law and his wife, blaming his sister-in-law for the divorce. *See id.*

- 68.I      *State v. Huber*, 361 N.W.2d 236 (N.D. 1985); *Murder* (same case, different victim: estranged wife's alleged lover)

- 69.I      *State v. Huber*, 361 N.W.2d 236 (N.D. 1985); *Murder* (same case, different victim: wife of lover)

- 70.I      *State v. Huber*, 361 N.W.2d 236 (N.D. 1985); *Murder* (same case, different victim: wife's sister-in-law)

- 71.I      *State v. Ott*, 686 P.2d 1001 (Or. 1984); *Murder*

EED instruction received. *See id.* at 1003. *Defendant and victim were separated on and off over a period of years.*<sup>502</sup> *During the last separation, the victim "began to live with another man."* *Id.* at

500. This case is classified as a "yes" instruction because the defendant clearly argued the defense and because, if a dissenting judge could reduce the verdict to manslaughter based on the record, *see People v. Fediuk*, 480 N.Y.S.2d 913, 914 (App. Div. 1984), there must have been sufficient evidence to reach a jury.

501. Defendant was convicted of four counts of murder and one of attempted murder. The opinion makes clear that the EED instruction applied to all four murder counts; indeed, one of the issues in the case was whether the defendant could argue EED when he killed third parties. The court ruled definitively "yes." *State v. Huber*, 361 N.W.2d 236, 241 (N.D. 1985).

502. The court described this relationship as follows:

[Defendant] had been warned by the "authorities" to stay away from Stephanie. She apparently caused him to be placed under a judicial restraining order; however, despite her obtaining the



1004 (emphasis added). The defendant reacted with extreme stress and threatened to kill her. *See id.* When the defendant's stepson was hurt and in the hospital, the defendant and the victim saw each other three times and the defendant believed that "the relationship was improving." *Id.* "He was thus angered and disappointed when his wife's new lover appeared at the hospital . . . ." *Id.* "Defendant left the hospital . . . retrieved a .22 rifle . . . caught up with his wife and her lover, ran their truck off the road and shot his wife three times." *Id.*

72.IA      State v. Lopez, 789 P.2d 39 (Utah 1990); *Murder*

EED instructions received. *See id.* at 42, 44. Defendant and victim, Cindy, lived together with her three children. *See id.* at 40. "Early in the morning, Cindy arrived home accompanied by a man, whom she introduced to *appellant as her new boyfriend.*" *Id.* at 41 (emphasis added). *The defendant refused to allow him to enter and the victim "became angry and ordered" the defendant to leave.* *Id.* (emphasis added). *The defendant and victim argued and she told him to leave again.* *See id.* "Appellant refused. Cindy again ordered appellant to leave and threw a piece of pottery at him, smashing it against the wall." *Id.*<sup>503</sup> He stabbed her and attempted to choke her oldest child. *See id.* At trial, defendant argued that he was "enraged and upset by being replaced as Cindy's boyfriend and being ordered out of the household after having diligently cared for Cindy's children." *Id.* at 44.

73.I        State v. Florez, 777 P.2d 452 (Utah 1989); *Murder*

EED instruction received. *See id.* at 458. *Defendant and his girlfriend, Dana Montes, had argued and he had packed his belongings, moving out of her home.* *See id.* at 453. *That night she started "a new relationship with Steve Meyers, the victim."* *Id.* (emphasis added). Four days later, the defendant returned, entered through a window, and found Dana naked and sleeping with her new lover. *See id.* The defendant became enraged and killed the rival. *See id.*

74.I        State v. Maurer, 770 P.2d 981 (Utah 1989); *Murder*

EED instruction received. *See id.* at 981. *Defendant was engaged to a woman, Janet, who had decided to "break off their relationship and began to move defendant's clothing out of the bedroom."* *Id.* at 982 (emphasis added). The victim wanted to date another man, Mike Bickley, a close friend of the defendant's, who was present at the time. *See id.* Defendant asked Bickley whether he felt guilty. *See id.* Bickley said "yes," and told defendant that he had difficulty having sexual relations with Janet. Defendant became enraged, grabbed a knife and stabbed Janet in the back. *See id.*

75.I        State v. Cloud, 722 P.2d 750 (Utah 1986); *Murder*

EED instruction received. *See id.* at 755. The defendant believed that Johnson, the victim, had been

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order, Stephanie telephoned him regarding their divorce. They engaged in an apparently protracted series of arguments on the telephone over child custody, which eventuated in the defendant's arrest and jailing for harassment. Even though they engaged in arguments and fights, they continued to associate. Defendant could not stay away from Stephanie and Stephanie did not always discourage his attentions.

State v. Ott, 686 P.2d 1001, 1004 (Or. 1984).

503. Since defendant's own theory of the case does not depend upon physical violence, but instead upon infidelity and "being forced to leave," State v. Lopez, 789 P.2d 39, 44 (Utah 1990), the case has not been classified as a physical violence case, *see* Appendix A.

seeing someone else.<sup>504</sup> “The homicide apparently occurred after a lengthy argument between Johnson and Cloud, in which Johnson told Cloud *that she intended to break their engagement*. Cloud . . . later admitted killing her.” *Id.* at 751 (emphasis added). Defendant argued in his defense that his alcoholism, “coupled with his distress over a prior divorce and the traumatic prospect of another failed relationship” created an EED. *Id.*

### III. SIMPLE INFIDELITY (16 Total; 12 I's)

76.I      *Lovlace v. Lopes*, 632 F. Supp. 306 (D. Conn. 1986), *aff'd mem.*, 802 F.2d 443 (2d Cir. 1986);<sup>505</sup> *Murder*

EED instruction received. *See id.* at 308–09. The defendant's wife had confessed her infidelity to him and they subsequently argued when defendant sought to discover the identity of his rival. *See id.* at 308. The defendant then shot her in the leg and chest with a 12-gauge shotgun. *See id.* At trial, defendant “called two psychiatrists in support of his claim that he had acted under the influence of an extreme emotional disturbance.” *Id.*

77.I      *Dixon v. State*, 597 S.W.2d 77 (Ark. 1980); *Manslaughter*

Defendant received manslaughter jury verdict.<sup>506</sup> The defendant and the victim had decided to marry and went to celebrate at a local bar. *See id.* at 78. When the victim asked an acquaintance to dance with her, defendant “became jealous and went home.” *Id.* When he returned, he saw his fiancée dancing with another man, and knocked her down. *See id.* Later that evening he beat her and she was taken to a hospital. *See id.* She died twelve days later. *See id.*

78.IF      *Worring v. State*, 638 S.W.2d 678 (Ark. Ct. App. 1982), *on appeal after remand from* 616 S.W.2d 23 (Ark. Ct. App. 1981); *Manslaughter*

Defendant was convicted by a jury of manslaughter. *See id.* at 679.<sup>507</sup> The defendant had “followed her husband's truck to a darkened area behind a truck terminal . . . [D]efendant found her husband seated in a parked automobile with [another woman]. . . . The confrontation ended with [defendant's] husband being shot.” *Id.*

79.I      *State v. Valera*, 848 P.2d 376 (Haw. 1993); *Manslaughter* (victim: wife)

Defendant “was found guilty by a jury of two counts of manslaughter” based on EED. *Id.* at 377; *see also id.* at 382 & n.9. Suspecting his wife of adultery, he followed her and another man. *See id.* at

504. *See* Brief for Appellant at 4–5, *State v. Cloud*, 722 P.2d 750 (Utah 1986) (No. 19884).

505. This is a post-conviction ruling based on the Connecticut decision in *State v. Lovlace*, 469 A.2d 391 (Conn. 1983).

506. The appellate court found sufficient evidence to support the manslaughter verdict under either an EED or a recklessness theory. *See* *Dixon v. State*, 597 S.W.2d 77, 80 (Ark. 1980) (“We think the evidence was more than sufficient to support a conviction for manslaughter under either § 41-1504(1)(a) [EED] or § 41-1504(1)(c) [recklessness].”).

507. “There was ample evidence from which the jury could find that appellant either recklessly caused her husband's death, or that she caused his death under [EED].” *Worring v. State*, 638 S.W.2d 678, 682 (Ark. Ct. App. 1982).

378 n.2. When he saw the man's pants undone, he fired shots into the car, and as she fled he shot her. *See id.* The defendant killed both his wife and her "alleged lover." *Id.*

80.I State v. Valera, 848 P.2d 376 (Haw. 1993); *Manslaughter* (same case, different victim: alleged lover)

81.I Grooms v. Commonwealth, 756 S.W.2d 131 (Ky. 1988); *Murder*

EED instruction received. *See id.* at 141. Defendant, an inmate at a Kentucky penitentiary, killed a female prison employee. *See id.* at 133. The defense argued that the defendant, "somewhat mentally retarded, fantasized about a relationship with the victim and was taunted into an uncontrollable rage," *id.* at 138, when fellow inmates, who had once teased him that the victim was the defendant's girlfriend, now teased him that "she was having a relationship with another man," *id.*<sup>508</sup> The jury was instructed on EED and the appeals court stated that, upon retrial, "'extreme emotional disturbance' should be defined in the instructions." *Id.* at 141.

82.A Smith v. Commonwealth, 737 S.W.2d 683 (Ky. 1987); *Murder*

EED instruction denied. *See id.* at 686. The defendant stated that he was "tired of [the victim] . . . trying to . . . get [his girlfriend] to go to bed with him," apparently in exchange for drugs. *Id.* at 685-86. He argued, on appeal, that he should have received an EED instruction because he came upon his girlfriend with the victim in a car with his pants down. *See id.* at 686. Evidence presented at trial suggested that the girlfriend and the defendant had actually set up the murder. *See id.* at 685.

83.I Estes v. Commonwealth, 744 S.W.2d 421 (Ky. 1987); *Manslaughter*

Defendant "was convicted of first degree manslaughter in the shooting death of his wife's lover." *Id.* at 422. "On the night in question, at the [defendant's] insistence, [the wife, Cindy] telephoned [her lover] in the [defendant's] presence, and arranged to meet him." *Id.* at 423. The defendant "then got a gun, cut the telephone cord to prevent [the wife] from calling [her lover] back to warn him, and departed in his truck to keep the appointment." *Id.* Although the wife's statement was improperly not excluded and the court therefore reversed and remanded, *see id.* at 425, the court found that, "[t]here was ample evidence that at the time of the shooting the [defendant] was enraged with jealousy, justifying an instruction on Manslaughter," *id.* at 426.

84.I People v. Aphaylath, 502 N.E.2d 998 (N.Y. 1986); *Murder*

Defendant relied upon an EED defense.<sup>509</sup> Defendant, a Laotian refugee, was convicted of murder in the second degree after killing his wife of one month because of his jealousy over his wife's apparent preference for an ex-boyfriend, suspicions he based on telephone calls between his wife and her ex-

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508. That the defendant in this case apparently fantasized about the relationship and the affair does not distinguish it materially from a variety of other so-called "infidelity" cases in which the allegations are demonstrably false or simply ungrounded fears. Nor does it distinguish it in law because the EED defense depends upon the defendant's perception.

509. The issue on appeal was whether evidence related to EED had been improperly excluded from the jury's consideration. *See People v. Aphaylath*, 502 N.E.2d 998 (N.Y. 1986). This would not have been an issue if the EED defense was not properly before the jury; hence the case is classified as a "yes" instruction.

boyfriend. *See id.* at 999. The defendant attempted to convince the jury that under Laotian norms this brought overwhelming embarrassment and shame to him. *See id.*

85.I      *People v. Dansa*, 569 N.Y.S.2d 535 (App. Div. 1991); *Murder*

EED instruction received: "Defendant . . . offered an affirmative defense of extreme emotional disturbance . . . which, if accepted by the jury, would have permitted it to reduce the murder count to manslaughter in the first degree." *Id.* at 537. Defendant claimed he shot his girlfriend because "she had been unfaithful." *Id.* at 537–38.

86.I      *People v. Rowe*, 568 N.Y.S.2d 648 (App. Div. 1991); *Murder*

Defendant argued "[a]t trial . . . that he was laboring under [EED] at the time of the killing," *id.* at 649, and expert testimony was received "concerning the defendant's emotional state," *id.* at 650.<sup>510</sup> Defendant killed the victim with a hammer, after finding him in bed with the defendant's long-time girlfriend. *See id.* at 649. He was picked up by the police while driving the victim's car. *See id.*

87.A      *People v. Shegog*, 547 N.Y.S.2d 725 (App. Div. 1989); *Murder, Attempted Murder* (victim: wife)

EED instruction denied with regard to both victims. *See id.* at 726. The defendant shot his wife and sister at close range, killing his wife and wounding his sister. *See id.* The defendant "did testify to some marital discord and jealousy, but minimized its effect on him emotionally." *Id.* The court found this insufficiently "indicative" of the "loss of self-control associated" with EED. *Id.*

88.A      *People v. Shegog*, 547 N.Y.S.2d 725 (App. Div. 1989); *Murder, Attempted Murder* (same case, different victim: sister)

89.I      *People v. David*, 533 N.Y.S.2d 627 (App. Div. 1988); *Murder*

EED instruction received.<sup>511</sup> After finding that his twenty-two-year-old wife had been involved with another man, defendant slashed her throat in front of their two children. *See id.* at 628. The defendant confessed to the murder, "explaining that they argued when he found a letter in her purse alluding to her relationship with another man." *Id.* at 629. According to the defendant, "[a]lthough he was very angry, they attempted a reconciliation only to realize that their relationship would never be the same because 'she wasn't pure anymore.' . . . [S]he wanted him to kill her and he complied." *Id.*

90.A      *People v. Lyness*, 495 N.Y.S.2d 848 (App. Div. 1985); *Attempted Murder*

EED instruction denied. *See id.* at 849. After consuming large quantities of alcohol and drugs, defendant armed himself with a shotgun and went in pursuit of wife's lover, intending to shoot him. *See id.* While attempting to elude capture for car theft, defendant shot a police officer. *See id.* On appeal,

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510. This case is classified as a "yes" instruction because the defendant relied upon the defense and presented evidence for it, and the appeals court indicated that the issue of intent relating to the emotional state was left to the jury. *See People v. Rowe*, 568 N.Y.S.2d 648, 650 (App. Div. 1991).

511. *See People v. David*, 533 N.Y.S.2d 627, 629 (App. Div. 1988) ("[E]ven if the jury did accept that the defendant murdered his wife while under the influence of 'extreme emotional disturbance' . . .").

the court found that defendant's rage about the infidelity did not prompt the shooting of the officer. *See id.*

91.I State v. Davis, 606 P.2d 671 (Or. Ct. App. 1980); *Murder*

EED instruction received. *See id.* at 673. Defendant claimed that he beat his female roommate to death with the barrel of a shotgun because of "an alleged sexual affair she had with a neighbor." *Id.* at 672. The defendant also told police that the devil was in the victim and that he had to kill her. *See id.* At trial, the jury could have either found that he suffered from a "mental disease or defect" or found "that he was suffering from an extreme emotional disturbance and thus guilty of manslaughter." *Id.* at 673.

#### IV. PHYSICAL VIOLENCE (22 Total; 17 I's)

##### A. Physical Violence and Separation

92. State v. Blades, 626 A.2d 273 (Conn. 1993); *Murder*

Defendant urged EED defense to a three-judge panel, which rejected it. *See id.* at 275. Defendant based his claim on the fact that he had a "marriage beset by troubles," prompted by the burning of his child in a fire. *Id.* After the fire, the defendant left the marital home but returned. *See id.* "The victim did not want the defendant back in the house. . . . [S]he was afraid of the defendant and . . . she wanted a divorce and a restraining order barring him from the house." *Id.* (emphasis added).<sup>512</sup> Defendant claimed that on the day of the homicide, they argued and his wife picked up a knife, cut him with it, and he then stabbed her. *See id.* at 282.

93.I State v. Robinson, 903 P.2d 1289 (Haw. 1995); *Murder*

EED instruction received. *See id.* at 1290. Defendant alleged that he and the victim had been arguing and that she went into a rage, told him to leave, and physically attacked him. *See id.* at 1290-91. Defendant tried to walk away but the victim punched him in the back at which point he "snapped." *Id.* at 1291. She died of asphyxiation. *See id.* Evidence was admitted at trial that the victim "wanted to get out of the relationship," *id.* (emphasis added), that she mentioned that her family lived in Las Vegas and she might make a good living there, *see id.*, and that on the night of the killing the defendant awakened the victim "wanting to make love to her, but that she did not want to be bothered," *id.* at 1290 n.3.

##### B. Physical Violence, Separation, and Infidelity

94.I Crook v. State, No. CACR92-1114, 1993 Ark. App. LEXIS 537 (Ct. App. Sept. 29, 1993); *Murder*

Defendant claimed an EED defense and the appeals court found reasonably that the jury could have rejected a manslaughter verdict. *See id.* at \*4. Defendant "testified that he and his wife had been having

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512. Briefs in this case indicate that the parties were still living together at the time of the killing and that both parties sought a divorce. The victim had scheduled a meeting with a lawyer on the day of the homicide to discuss a variety of matters, including a divorce. *See* Brief for Defendant-Appellant at 2, State v. Blades, 626 A.2d 273 (Conn. 1993) (No. 14383).

problems, they had been separated for several weeks and his wife was having an affair." *Id.* at \*3 (emphasis added). The day of the shooting, he returned to their apartment to find the locks had been changed. *See id.* at \*4. As he was leaving, he ran into her, they argued, and she jabbed a pen into his arm, telling him she was going to kill him. *See id.*

95. State v. Gaynor, 880 P.2d 947 (Or. Ct. App. 1994); *Murder*

Defendant presented EED defense at a bench trial and argued on appeal that the court should have granted a motion for acquittal based on EED. *See id.* at 950–51. *The defendant claimed that he "had been suffering from confusion and depression for many months, perhaps even years, prior to this incident as a result of his separation and divorce."* *Id.* at 950 (emphasis added). His ex-wife's "dating Robert Cross was too much for defendant to handle." *Id.* Defendant also claimed that, before he killed Cross, Cross attacked him physically. *See id.* at 949.

96.I State v. Lyon, 672 P.2d 1358 (Or. Ct. App. 1983); *Murder*

Defendant asserted an EED defense. *See id.* at 1359.<sup>513</sup> *The defendant and his wife were divorced. See id.* "His ex-wife had been seeing the victim, Briggs, on a regular basis. Defendant was also a frequent visitor at his ex-wife's house, and friction developed between Briggs and him. On the night in question, defendant went, unannounced, to his ex-wife's house to pick up some important papers." *Id.* (emphasis added). Defendant "arrived there armed with a rifle and a pistol, . . . went to his ex-wife's bedroom, where he found her in bed with Briggs. Briggs had concealed a revolver under the covers and fired through them, wounding defendant. Defendant fired back, killing Briggs." *Id.*

### C. Physical Violence and Infidelity

97.IAF State v. Bryan, 641 A.2d 443 (Conn. App. Ct. 1994), *overruled by* State v. Person, 673 A.2d 463 (Conn. 1996); *Murder*

EED instruction denied at trial and conviction was reversed on appeal for failure to instruct. *See id.* at 444. The victim and a man named Dawes were involved for several years and had a child together. *See id.* During a period in which Dawes and the victim were separated, Dawes started dating the defendant. *See id.* Eventually, the victim and Dawes resumed dating, but the defendant and Dawes remained friends. *See id.* The defendant claimed she killed the victim at Dawes's home after the victim demanded that she leave and they engaged in a fist fight. *See id.* at 447.<sup>514</sup>

98.AI State v. Dumlao, 715 P.2d 822 (Haw. Ct. App. 1986); *Murder*

EED instruction denied at trial but conviction was reversed for failure to instruct. *See id.* at 831–32. A psychiatrist testified that defendant suffered from "pathological jealousy," "harbor[ing] the belief that other males, including his wife's relatives, were somehow sexually involved with her." *Id.* at 831. "For

513. Defendant's argument on appeal that the jury's instructions unconstitutionally shifted the burden of proof to him presumes that such instructions were given. *See* State v. Lyon, 672 P.2d 1358, 1359 (Or. Ct. App. 1983).

514. This case is classified as "physical violence and infidelity" rather than "physical violence, infidelity, and separation" because the primary relationship between Dawes and the victim was back "on," when the victim told the defendant (her rival) to leave.

example, when somebody glanced or gazed at his wife, he would consider it a personal affront and could well believe that a sexual overture had been made to her.” *Id.* This extreme jealousy had caused defendant to beat and threaten to kill his wife. *See id.* On the night of the killing, the defendant testified that he believed one of his brothers-in-law was sleeping with his wife, that his brother-in-law rushed at him with a knife saying, “[m]y sister suffer ten years. You going to pay,” and that the gun went off killing his mother-in-law. *Id.* at 832.

#### D. *Physical Violence*

99.IA Rainey v. State, 837 S.W.2d 453 (Ark. 1992); *Murder*

EED instruction denied. *See id.* at 454. Defendant’s conviction was reversed on appeal for failure to instruct. *See id.* at 457. The defendant and the victim had engaged in sexual intercourse and had a fight afterwards. *See id.* at 454. The victim picked up the gun that the defendant had left in the kitchen and threatened to tell his wife about their affair. *See id.*<sup>515</sup> She then tried to fire the gun at him and after a struggle defendant shot the victim in the head four times. *See id.*

100.IF McDonald v. State, 852 S.W.2d 833 (Ark. Ct. App. 1993); *Manslaughter*

Defendant was charged with second degree murder, “but was instead convicted of manslaughter, which is committed by one who ‘causes . . . death . . . under the influence of [EED].’” *Id.* at 836 (citation omitted). The defendant admitted that she shot and killed her live-in boyfriend, but claimed that he had a history of violent behavior toward her and that he had precipitated the killing by violent acts. *See id.*

101.I Donovan v. State, 764 S.W.2d 47 (Ark. Ct. App. 1989); *Manslaughter*

EED instruction received and jury convicted defendant of manslaughter. *See id.* at 50.<sup>516</sup> The defendant claimed that when he and his girlfriend arrived home, she became agitated and began throwing things at him. *See id.* at 47. When she attempted to throw the television set, he claims to have pushed her aside and taken the television away from her, at which time she fell and died. *See id.* Expert medical testimony at trial showed belt bruises on her neck, fist marks on her face, and a footprint on her back. *See id.* at 48.

102.I State v. Manfredi, 569 A.2d 506 (Conn. 1990); *Manslaughter*

Defendant was convicted of EED manslaughter. *See id.* at 507. The defendant testified that he and his wife argued and that she slapped and punched him, along with hitting him with a baseball bat. *See id.* at 509 n.6. The defendant argued at trial that this caused a “catathymic crisis,” reviving his “feelings of humiliation, degradation and rage over being hit with a yardstick as a child.” *Id.* at 509–10. The defendant then struck and killed his wife with the bat, before placing her in a car and staging an automobile accident. *See id.* at 509 n.9.

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515. Since this is the defendant’s, rather than the provoking party’s affair, this case is not classified as “physical violence and infidelity.” *See* Appendix A.

516. It is unclear whether the verdict was based on EED or recklessness. *See* Donovan v. State, 764 S.W.2d 47, 50 (Ark. Ct. App. 1989).

103. State v. D'Antuono, 441 A.2d 846 (Conn. 1982); *Murder*

EED defense rejected by three-judge panel, which convicted defendant of murder. *See id.* at 847. The defendant claimed that he and victim had engaged in sexual intercourse after a date and then had an argument. *See id.* at 848. The defendant alleged that the victim had attempted to stab him. *See id.* The victim was stabbed to death. *See id.* at 509 n.6

104.I Ross v. State, 482 A.2d 727 (Del. 1984); *Murder*

EED instruction received. *See id.* at 737. The defendant rented a room in a woman's trailer home. *See id.* at 731. She told him "lurid tales charging [her estranged husband]<sup>517</sup> with wife-beating and sexual abuse as well as cruel and inhuman treatment of their handicapped child. She asked Ross if he would be willing to kill her husband; and Ross answered, 'Yes.'" *Id.* The jury was instructed on EED based on defendant's claim that he killed the estranged husband believing the abuse of the wife and child was wrong. *See id.* at 737.

105.F McBride v. State, 477 A.2d 174 (Del. 1984); *Murder*

EED instruction unknown. Defendant was convicted of first degree murder for the death of her husband. *See id.* at 177. Defendant was alleged to have conspired with Ross (see above) to kill her estranged spouse. *See id.* at 178-79. The defendant had been separated from the victim for three months and "had also filed for divorce." *Id.* at 178.<sup>518</sup> The defendant alleged that the victim had physically abused her and their handicapped son. *See id.* The defendant appears to have raised an EED defense at trial, but it is unclear whether the jury was instructed on EED.<sup>519</sup>

106.I Hale v. Commonwealth, No. 85-SC-818-MR, *available in* LEXIS, State Library, Kycts File (Ky. Dec. 18, 1986); *Murder*

EED instruction received.<sup>520</sup> The defendant was the new boyfriend of a woman who had recently divorced her husband, the victim. *See slip op.* at 1. The defendant testified "that the victim pulled his truck off the road, struck him in the stomach, grabbed him by the hair and said that he was going to die because he was a wife-stealer." *Id.* The defendant claimed EED based on "acts and words" (i.e., physical violence and "wife-stealer") and argued that he was susceptible to EED "when faced with threat of physical injury due to a gunshot wound he suffered in 1976." *Id.*<sup>521</sup>

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517. This is not classified as a "separation and physical violence" case because the claim is not that the provoking party/victim left a defendant who sought to continue the relationship; the wife, McBride, sought to leave.

518. Since we know that the defendant, rather than the provoking party, caused this separation, the case is not classified as "physical violence and separation." There was also evidence that she had been unfaithful, dating another man, while she and the defendant were still living together. *See McBride v. State*, 477 A.2d 174, 178 (Del. 1984).

519. "In anticipation of her defense that she killed under extreme emotional distress and acted in justification due to physical, sexual and emotional abuse inflicted upon her and her children, defendant submitted the following questions to be asked of the array during jury selection . . ." *Id.* at 190.

520. The appellate court stated at one point that "[t]he trial judge refused to give any instruction relative to extreme emotional disturbance." Hale v. Commonwealth, No. 85-SC-1818-MR, slip op. at 2 (Ky. Dec. 18, 1986). Later, however, the court described the jury instructions that were given on EED and concluded: "We believe the trial judge instructed on the mitigating defense of extreme emotional disturbance sufficiently under the circumstances." *Id.*

521. This case is not classified as a "physical violence, infidelity, and departure" because it was the defendant's own claimed "infidelity" that led to the fight.



107.IF *People v. Cutting*, 621 N.Y.S.2d 149 (App. Div. 1994); *Murder*

EED instruction received. *See id.* at 150. Defendant "claimed that she went to the scene to discuss repayment of the loans decedent had made to her. She also stated that decedent threatened to tell her husband about the loans and that she shot decedent when he tried to force himself upon her." *Id.* Defendant's EED claim was based on "her husband's abuse and fear of her husband's reaction" if he found out about the loans. *Id.*

108.A *People v. Murden*, 593 N.Y.S.2d 837 (App. Div. 1993); *Murder*

EED instruction denied. *See id.* at 838. Defendant testified that he and his girlfriend were arguing over "his living arrangements" when the argument became violent. *Id.* According to the defendant, he wrested a knife from his girlfriend's grasp and then blacked out and did not recall stabbing her nineteen times. *See id.*

109.IF *People v. Ciervo*, 506 N.Y.S.2d 462 (App. Div. 1986); *Manslaughter*<sup>522</sup>

EED instruction received, *see id.* at 463, and defendant was convicted of manslaughter, *see id.* at 462. Defendant claimed complete justification "alleging that she acted in the defense of herself and her children, as her son was being beaten by the decedent on the morning of the shooting." *Id.* at 463. Evidence was admitted in the case that the defendant was a "drug user, a neglectful mother, an adulteress, and an inadequate housekeeper," on the theory "that the jury was entitled to know whether the defendant's actions provoked her husband into beating her"—evidence found "properly admitted" but necessitating a limiting instruction. *Id.* at 464–65.

110.IF *People v. Emick*, 481 N.Y.S.2d 552 (App. Div. 1984); *Manslaughter*<sup>523</sup>

Defendant indicted for and convicted of EED manslaughter. *See id.* at 553, 560. Defendant shot her husband in the head while he was sleeping. *See id.* at 553. When police arrived at the scene, she told them that "decedent had been physically abusing her for the past year and a half and that, on the evening before the shooting, [the decedent] told her that he wanted her to commit suicide or he would kill her." *Id.* at 554.<sup>524</sup>

111.IF *People v. Powell*, 424 N.Y.S.2d 626 (Tompkins County Ct. 1980), *aff'd*, 442 N.Y.S.2d 645 (App. Div. 1981); *Murder*

EED instruction received. *See id.* at 631. Defendant testified that the victim had "'beat her up' on the average of twice a week and she had been confined in several hospitals as a result; that she had divorced [the victim] as she could not take any more beatings." *Id.* at 628. A year after the divorce, defendant dropped off her son for visitation, found the decedent smoking marijuana, and reported it to the police. *See* 442 N.Y.S.2d at 646. When the defendant returned for her son several days later, the

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522. Based on other errors in the trial, the murder count was dismissed with leave to reapply for an indictment to the grand jury. *See People v. Ciervo*, 506 N.Y.S.2d 462, 463 (App. Div. 1986).

523. At trial, the jury was instructed to "presuppose the existence of extreme emotional disturbance," an instruction that the defendant claimed prejudiced her justification claim. Lack of explanation of the limits of the presumption was held to be error. *People v. Emick*, 481 N.Y.S.2d 552, 562 (App. Div. 1984).

524. During the argument, defendant "repeatedly asked her if she had ever had sex" with another man, *id.* at 554, which the victim denied. If true, this would be the defendant's, not the victim's, infidelity, and therefore the case is not classified as "physical violence and infidelity." *See* Appendix A.

victim insisted on driving the defendant and her son back to their home. *See id.* During the drive, he pulled a gun, "menacing defendant with it, and further, he angrily expressed his disapproval" of defendant's call to the police. *Id.* Instead of returning home, the victim searched for a hotel room. *See id.* When he fell asleep after stopping at a motel, the defendant removed the gun from his pants. *See id.* As she did so, he awoke and the gun went off, shooting him in the heart. *See* 424 N.Y.S.2d at 629. Other evidence suggested that the defendant had purchased the gun and intended to harm the victim. *See* 442 N.Y.S.2d at 646.

112.I      State v. Hessel, 844 P.2d 209 (Or. Ct. App. 1992); *Murder*<sup>525</sup>

EED instruction received. *See id.* at 211 n.2. After meeting the victim, she and the defendant parked in his car, where they engaged in oral sex. *See id.* at 210. After the victim bit defendant's penis, he proceeded to strangle her. *See id.* On appeal, defendant argued that it was improper for the jury to be instructed "that EED is available as a partial defense to intentional murder but not to aggravated murder." *Id.* at 211.

113.IF      State v. Strieby, 790 P.2d 98 (Utah Ct. App. 1990); *Manslaughter*

EED verdict received after a bench trial. *See id.* at 99. She claimed that she acted in self-defense. *See id.* While defendant and victim were drinking, a struggle ensued during which the victim tried to slap the defendant and pinned her to the floor by the throat. *See id.* The defendant left and later another struggle ensued between the defendant and the victim. *See id.* This time, defendant shot the victim as he ascended the stairs after her, refusing to leave at her request. *See id.* Defendant appealed the decision on the ground that the evidence was insufficient to convict her of manslaughter. *See id.*<sup>526</sup>

#### IV. OTHER (20 Total; 7 I's)

114.I      State v. Watlington, 579 A.2d 490 (Conn. 1990); *Murder* (victim: brother-in-law), *Assault* (victim: wife)<sup>527</sup>

EED instruction received. *See id.* at 495. The defendant's brother-in-law, the victim, had moved into the defendant's house. *See id.* at 496. Subsequently, the defendant's wife had stopped drug treatment and returned to alcohol and crack use. *See id.* The defendant ordered the victim to leave the house. *See id.* When he refused several times, the defendant shot him. *See id.* Upon hearing the shot, the defendant's wife entered the room and was shot and injured. *See id.* The defendant then shot and killed the victim. *See id.*

115.I      State v. Marino, 462 A.2d 1021 (Conn. 1983); *Manslaughter*

On appeal, defendant argued, *inter alia*, that there was insufficient evidence to support a manslaughter verdict. *See id.* at 1023. He claimed that he and the victim had been arguing about a skiing

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525. Defendant was charged with several counts of aggravated and intentional murder, although there appears to be only a single victim. *See* State v. Hessel, 844 P.2d 209 (Or. Ct. App. 1992).

526. On appeal, the court found that the state had failed to prove the elements of manslaughter beyond a reasonable doubt. *See* State v. Strieby, 790 P.2d 98, 101 (Utah Ct. App. 1990).

527. It is unclear whether the defendant received an EED charge with respect to both victims; hence the case is only counted as a "single victim" case.

trip and that she had said she would kill herself if he did not let her go, which she then did. *See id.* at 1027. The court found that there was sufficient evidence to convict under all versions of manslaughter,<sup>528</sup> including EED manslaughter based on “the evidence of the relationship of the defendant to the victim, the quarrel which preceded the shooting and his distraught appearance at the time the police arrived.” *Id.* at 1028.

116. State v. Zdanis, 438 A.2d 696 (Conn. 1980); *Murder*

EED defense rejected at trial by three-judge panel. *See id.* at 698. The defendant arrived home late one evening and argued with his wife. *See id.* at 699. He testified that his wife complained that he was never at home and threatened to commit suicide. *See id.* He further testified that in a struggle with her over the gun,<sup>529</sup> two shots hit his stepdaughter. *See id.* The defendant then followed his wife outside the apartment, shot her, and himself.<sup>530</sup> At trial, he claimed that he “was upset about the impending death of his niece, his marriage problem and the possible suicide by his wife.” *Id.* at 700.<sup>531</sup>

117.I State v. Holbron, 904 P.2d 912 (Haw. 1995); *Attempted Murder*

Defendant “requested—and the circuit court agreed to give—instructions regarding the mitigating defense of attempted manslaughter by virtue of ‘extreme mental or emotional disturbance.’” *Id.* at 916. The defendant became violent after his girlfriend arrived at his home with dinner, which he rejected. *See id.* at 915. He poured gasoline on her and threw two lit matches at her, the second of which caused the gasoline to ignite. *See id.* The victim suffered severe burns as the house burned down. *See id.* The issue on appeal was whether the defendant could be convicted of attempted reckless homicide. *See id.* at 916.

118.A Whitaker v. Commonwealth, 895 S.W.2d 953 (Ky. 1995); *Murder*

EED instruction denied at trial and appellate court found no error. *See id.* at 954. The defendant went to his estranged wife’s place of employment, supposedly to sign some tax documents. *See id.* He proceeded to shoot her in the head at close range. *See id.*<sup>532</sup>

119.A Morgan v. Commonwealth, 878 S.W.2d 18 (Ky. 1994); *Murder*

EED instruction denied. *See id.* at 19. On his thirtieth birthday, the defendant met with his wife and had a brief celebration before he picked up his mistress and went to a party. *See id.* Bills and papers were found strewn about when police found the wife dead. *See id.* at 20. Apparently, the defendant claimed an instruction based on the theory that the couple had argued about the “other woman.” *See id.* The appellate court found any such inference speculative. *See id.*

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528. If the evidence was legally sufficient to convict, it was obviously legally sufficient to send the case to a jury had it been tried to a jury. Hence, the case is coded as a “yes” instruction.

529. Defendant claimed EED in the alternative; he did not argue that the physical violence of the struggle enraged him and caused him to shoot the victim. *See* State v. Zdanis, 438 A.2d 696, 698, 700 (Conn. 1980).

530. On appeal, the court suggested that the defendant’s claim that the daughter’s death was accidental was inconsistent with an EED claim, but appeared to consider the defense with respect to his killing of his wife. *See id.* at 700. Because of ambiguities about whether the claim was asserted with respect to both victims, the case is counted as a “single victim” case.

531. The only murder count here was for the death of the stepdaughter. *See id.* at 698.

532. This case appears similar to the “departure” cases but there are insufficient facts to confidently place it in that category. Hence, it was placed in “other.”

120.IA     *People v. Moye*, 489 N.E.2d 736 (N.Y. 1985); *Murder*

EED instruction denied at trial but appellate court ruled that an EED instruction should have been granted. *See id.* at 739. The defendant and victim attempted intercourse and after the defendant was unable to maintain an erection, she began laughing at him, "poking at him, saying, 'go on little boy. I don't need you.'" *Id.* at 738. The defendant then decapitated and eviscerated her. *See id.* The court found that there was sufficient evidence for submission to the jury of an "explanation or excuse for defendant's emotional state, in his recounting of the victim's continued ridicule and taunting about his impotence." *Id.* at 739.<sup>533</sup>

121.A     *People v. Matthews*, 632 N.Y.S.2d 298 (App. Div. 1995); *Murder*

EED instruction denied. *See id.* at 300. The victim and the defendant, who was in a relationship with someone else, engaged in sexual intercourse. *See id.* The defendant testified that he became emotionally disturbed afterwards upon being told by the victim that she had given him "a present," referring to a sexually transmitted disease. *Id.*

122.I     *People v. Liebman*, 583 N.Y.S.2d 234 (App. Div. 1992); *Manslaughter*

Defendant convicted of second degree murder, but the appellate court reduced the verdict to manslaughter based on EED. *See id.* at 242–43. The defendant's relationship with the victim was very turbulent and both were under the care of a psychiatrist. *See id.* at 236–38. Enraged by his wife's refusal to provide him the funds for psychiatric care, the defendant argued with the victim. *See id.* at 238. The defendant reported that his wife taunted him to take "90 seconals" and kill himself, whereupon he lost control and stabbed her fifty-one times. *See id.* In reducing the verdict to manslaughter, the appellate court found that "the defendant's apparently long-harboured feelings of being hated and rejected by his wife, would have seemed tragically confirmed by his wife's suggestion . . . that he could solve his problems" by committing suicide. *Id.* at 239.

123. *People v. Glaser*, 564 N.Y.S.2d 893 (App. Div. 1990); *Murder* (victim: estranged wife)

EED instruction denied with respect to all three victims. *See id.* at 894. The defendant fatally shot his estranged wife and her parents as a result of "his dissatisfaction with divorce negotiations, particularly the division of the proceeds of the marital residence." *Id.* The appellate court found that, even if the defendant were subjectively upset, that was no "reasonable explanation or excuse" for his emotional disturbance. *See id.*<sup>534</sup>

124.     *People v. Glaser*, 564 N.Y.S.2d 893 (App. Div. 1990); *Murder* (same case, different victim: estranged wife's mother)

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533. Given the court's explicit focus on the taunting as sufficient, without regard to the "poking," the case is classified as "other," without regard to whether "poking" should be considered "physical violence."

534. It is unclear whether the case was tried to a jury or a court and therefore is classified as a "no" instruction case. This case is classified as "other," rather than "departure" because there is no indication that the estranged wife sought to leave and the court's emphasis on the "proceeds of the marital residence" suggests that the emotionally upsetting factor related to money rather than loss of the relationship.

125. *People v. Glaser*, 564 N.Y.S.2d 893 (App. Div. 1990); *Murder* (same case, different victim: estranged wife's father)

- 126.A *People v. Deresky*, 525 N.Y.S.2d 49 (App. Div. 1988); *Attempted Murder* (victim: first police officer)

EED instruction denied with respect to both police officers. *See id.* at 51. Two police officers responded to a distress call from two women the defendant was harassing with a gun. *See id.* at 50. Upon opening the door, the defendant pointed a shotgun at the officers and pulled the trigger. *See id.* The gun, however, failed to fire. *See id.* On appeal, the court affirmed the trial court's refusal to charge on EED based on the "fact that the defendant and his female companion argued prior to the arrival of the police." *Id.* at 51.

- 127.A *People v. Deresky*, 525 N.Y.S.2d 49 (App. Div. 1988); *Attempted Murder* (same case, different victim: second police officer)

128. *People v. Rivera*, 507 N.Y.S.2d 266 (App. Div. 1986); *Murder*

EED defense rejected at bench trial. *See id.* at 267. The defendant fatally shot his estranged wife. *See id.* at 266. The court found that the record "reflects that the defendant's relationship with his estranged wife was plagued by constant strife, as evidenced by their periodic separations, and was punctuated by sporadic instances of physical abuse by the defendant." *Id.* at 267. The court concluded that "defendant's reaction to his rather tortured marital situation" did not support an EED defense. *Id.*

- 129.A *People v. Knights*, 486 N.Y.S.2d 377 (App. Div. 1985); *Murder*

EED instruction denied. *See id.* at 379. "On the evening of July 9, 1982, defendant engaged in a vehement argument with his wife, Louise Knights, regarding her whereabouts earlier that evening." *Id.*<sup>535</sup> The court found that the argument and the fact that defendant "had notified the police of his irritation regarding her immoral behavior [were] insufficient to give substance to the defense." *Id.*

- 130.I *People v. Morrison*, 464 N.Y.S.2d 245 (App. Div. 1983); *Murder*

Male defendant argued that "proof at trial established, as a matter of law, an affirmative defense" of EED. *Id.* at 246. After forcing his wife to take an overdose of phenobarbital, defendant proceeded to suffocate her with a pillow. *See id.* The defendant claimed that he killed his wife because her repeated suicide attempts caused him extreme emotional disturbance. *See id.* On appeal, the court found "nothing in the record to warrant our disturbance of the jury's finding that the defense was not proven in this instance." *Id.*

- 131.A *People v. Adams*, 423 N.Y.S.2d 936 (App. Div. 1980), *aff'd*, 422 N.E.2d 537 (N.Y. 1981); *Attempted Murder*

EED instruction denied and defendant convicted of attempted murder of a police officer. *See id.*

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535. There is a suggestion that the question about the whereabouts involved allegations of an affair. *See, e.g., People v. Knights*, 486 N.Y.S.2d 377, 379 (App. Div. 1985) (suggesting he believed her behavior immoral). Without further elaboration of this claim, however, the case has been classified as "other."

at 940–41. The defendant was holding a gun to a woman's head when a police officer approached him. *See id.* at 937. The defendant fired two shots at the officer, who shot back, wounding the defendant. *See id.* The defendant fired two more shots at the officer and fled. *See id.* Testimony at trial indicated that prior to the shooting of the officer, the defendant was arguing with his girlfriend. *See id.* at 938. On appeal, the court rejected his argument that he should have received an EED instruction because the defendant's own testimony did not raise EED as a defense. *See id.* at 940.

132.A     *State v. Skjonsby*, 319 N.W.2d 764 (N.D. 1982); *Murder, Attempted Murder*<sup>536</sup>

Defendant asserted on appeal that an EED instruction "should have been given." *Id.* at 778. The defendant "asserted . . . the following . . . factors . . . which establish 'extreme emotional disturbance': (1) failing businesses and several lawsuits concerning those businesses; (2) problems with his relationship with [his girlfriend]; (3) putting his grandmother in a nursing home; (4) [a threatening telephone call]; and (5) his fear that [his girlfriend] was in trouble." *Id.* at 779.

133.I     *State v. Counts*, 816 P.2d 1157 (Or. 1991); *Murder*<sup>537</sup>

In a bench trial, the court "expressly noted that there was sufficient evidence to support a finding of [EED]." *Id.* at 1166. The defendant shot his wife in the head, then placed the gun in her hand and dialed 911 to report that she had committed suicide. *See id.* at 1158. He claimed that she was trying to fatally poison him and his dogs, and that he thought she had taken out an insurance policy on him. *See id.* at 1158–59. The trial court held that the defendant was precluded from an EED defense if he also raised an insanity claim, *see id.* at 1159, a legal ruling reversed on appeal, *see id.* at 1164–66.

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536. It is unclear whether the defendant was permitted to assert an EED defense with respect to both charges. *See State v. Skjonsby*, 319 N.W.2d 764, 778–79 (N.D. 1982). Hence, the case is classified as a single claim.

537. The trial court found the defendant guilty of murder but not responsible because of insanity. *See State v. Counts*, 816 P.2d 1157, 1159 (Or. 1991).

## APPENDIX C: TRADITIONAL AND MIXED CASES

The cases listed below represent a sample from traditional and mixed jurisdictions.<sup>538</sup> Cases designated "I" are cases in which the trial jury received an "extreme emotional disturbance" (EED) instruction, as defined in Appendix A. Cases with no "I" designation are cases in which the trial jury was not instructed or in which the instruction remains "unknown." Cases designated "A" were appealed for failure to instruct on EED. Cases designated "F" involve female defendants.

## TRADITIONAL STATES (ILLINOIS AND ALABAMA)

## I. DEPARTURE (7 Total; 0 I's)

- 1.A Gholston v. State, 494 So. 2d 876 (Ala. 1986)
- 2.A Fisher v. State, 587 So. 2d 1027 (Ala. Crim. App. 1991)
- 3.A Fisher v. State, 587 So. 2d 1027 (Ala. Crim. App. 1991) (same case, different victim)
- 4.A Fisher v. State, 587 So. 2d 1027 (Ala. Crim. App. 1991) (same case, different victim)
- 5.A Pennell v. State, 429 So. 2d 679 (Ala. Crim. App. 1983)
- 6. People v. Davis, 583 N.E.2d 64 (Ill. App. Ct. 1991)
- 7.A People v. Neal, 446 N.E.2d 270 (Ill. App. Ct. 1983)

## II. SEPARATION AND INFIDELITY (18 Total; 7 I's)

- 8.A Speake v. State, 610 So. 2d 1238 (Ala. Crim. App. 1992)
- 9.A Purser v. State, 607 So. 2d 298 (Ala. Crim. App. 1991), *rev'd on other grounds*, 607 So.2d 301 (Ala. 1992)
- 10.I Purser v. State, 607 So. 2d 298 (Ala. Crim. App. 1991), *rev'd on other grounds*, 607 So.2d 301 (Ala. 1992) (same case, different victim)
- 11.A Harrison v. State, 580 So. 2d 73 (Ala. Crim. App. 1991)
- 12. White v. State, 587 So. 2d 1218 (Ala. Crim. App. 1990), *aff'd*, 587 So.2d 1236 (Ala. 1991)
- 13.A People v. Lopez, 655 N.E.2d 864 (Ill. 1995)
- 14.A People v. McCarthy, 547 N.E.2d 459 (Ill. 1989), *remanded*, 559 N.E.2d 996 (Ill. App. Ct. 1990)
- 15.A People v. Flores, 544 N.E.2d 942 (Ill. 1989)
- 16.A People v. Hightower, 629 N.E.2d 1197 (Ill. App. Ct. 1994)
- 17.I People v. Campos, 592 N.E.2d 85 (Ill. App. Ct. 1992)
- 18.I People v. Campos, 592 N.E.2d 85 (Ill. App. Ct. 1992) (same case, different victim)
- 19.A People v. Elder, 579 N.E.2d 420 (Ill. App. Ct. 1991)
- 20.I People v. Taylor, 536 N.E.2d 1312 (Ill. App. Ct. 1989)
- 21.IA People v. Ambro, 505 N.E.2d 381 (Ill. App. Ct. 1987)
- 22.A People v. Simpson, 473 N.E.2d 350, (Ill. App. Ct. 1984)

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538. See Appendix A (describing selection methodology).

- 23.I      *People v. Middleswart*, 463 N.E.2d 1050 (Ill. App. Ct. 1984)
- 24.A.    *People v. Harris*, 463 N.E.2d 1030 (Ill. App. Ct. 1984)
- 25.I      *People v. Carr*, 414 N.E.2d 1108 (Ill. App. Ct. 1980)<sup>539</sup>

### III. SIMPLE INFIDELITY (9 Total; 4 I's)

- 26.IF     *Martin v. State*, 610 So. 2d 1195 (Ala. Crim. App. 1992)
- 27.IA     *Anderson v. State*, 507 So.2d 580 (Ala. Crim. App. 1987)
- 28.       *People v. Chevalier*, 544 N.E.2d 942 (Ill. 1989), *rev'g* 521 N.E.2d 1256 (Ill. App. Ct. 1988)
- 29.       *People v. Falls*, 601 N.E.2d 1276 (Ill. App. Ct. 1992)
- 30.       *People v. Schorle*, 565 N.E.2d 84 (Ill. App. Ct. 1990)
- 31.I       *People v. Buckner*, 561 N.E.2d 335 (Ill. App. Ct. 1990)
- 32.       *People v. Duncan*, 553 N.E.2d 774 (Ill. App. Ct. 1990)
- 33.       *People v. Wiley*, 541 N.E.2d 1345 (Ill. App. Ct. 1989)
- 34.I       *People v. Pruitt*, 506 N.E.2d 696 (Ill. App. Ct. 1987)

### IV. PHYSICAL VIOLENCE (43 Total; 26 I's)

#### A. *Physical Violence and Separation*

- 35.I       *McLaughlin v. State*, 586 So. 2d 267 (Ala. Crim. App. 1991)
- 36.I       *People v. Green*, 599 N.E.2d 39 (Ill. App. Ct. 1993)
- 37.       *People v. Stephenson*, 571 N.E.2d 943 (Ill. App. Ct. 1991)
- 38.IA      *People v. Robinson*, 545 N.E.2d 268 (Ill. App. Ct. 1989)
- 39.F       *People v. Hood*, 547 N.E.2d 637 (Ill. App. Ct. 1989)
- 40.F       *People v. Crum*, 539 N.E.2d 196 (Ill. App. Ct. 1989)
- 41.I       *People v. Nelson*, 474 N.E.2d 23 (Ill. App. Ct. 1985)

#### B. *Physical Violence, Separation, and Infidelity*

- 42.A       *Carey v. State*, 560 So. 2d 1103 (Ala. Crim. App. 1989)
- 43.I       *Biggs v. State*, 441 So.2d 989 (Ala. Crim. App. 1983)
- 44.I       *Brown v. State*, 401 So.2d 213 (Ala. Crim. App. 1981)
- 45.A       *People v. Cedeno*, 635 N.E.2d 1047 (Ill. App. Ct. 1994)
- 46.       *People v. Santiago*, 582 N.E.2d 1304 (Ill. App. Ct. 1991)
- 47.I       *People v. Heredia*, 550 N.E.2d 1023 (Ill. App. Ct. 1989)
- 48.FA      *People v. Cox*, 459 N.E.2d 269 (Ill. App. Ct. 1984)
- 49.A       *People v. Peery*, 439 N.E.2d 1087 (Ill. App. Ct. 1982)
- 50.       *People v. Miller*, 421 N.E.2d 406 (Ill. App. Ct. 1981)

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539. To the extent that *Carr* depended upon verbal communications of adultery rather than actually "witnessing" the act, it was overruled in *People v. Chevalier*, 544 N.E.2d 942 (Ill. 1989); *see also* *People v. Hightower*, 629 N.E.2d 1197 (Ill. App. Ct. 1994).



- 51.I      *People v. Evans*, 405 N.E.2d 503 (Ill. App. Ct. 1980)

C. *Physical Violence and Infidelity*

- 52.IF      *Shiflett v. State*, 507 So.2d 1056 (Ala. Crim. App. 1987)  
 53.      *People v. Burts*, 628 N.E.2d 515 (Ill. App. Ct. 1993), *vacated and remanded*, 630 N.E.2d 845 (Ill. 1994)  
 54.      *People v. Dower*, 578 N.E.2d 1153 (Ill. App. Ct. 1991)  
 55.F      *People v. Williams*, 576 N.E.2d 68 (Ill. App. Ct. 1991)  
 56.IF      *People v. Moore*, 562 N.E.2d 215 (Ill. App. Ct. 1990)

D. *Physical Violence*

- 57.I      *Gentry v. State*, No. CR-92-0409, 1994 WL 529410 (Ala. Crim. App. Sept. 30, 1994), *rev'd and remanded on other grounds*, No. 1940471, 1996 WL 390618 (Ala. July 12, 1996)  
 58.I      *Hill v. State*, 516 So.2d 876 (Ala. Crim. App. 1987)  
 59.IF      *Hill v. State*, 507 So.2d 554 (Ala. Crim. App. 1986)  
 60.IAF      *Freeman v. State*, 505 So.2d 1079 (Ala. Crim. App. 1986)  
 61.I      *Cox v. State*, 500 So.2d 1296 (Ala. Crim. App. 1986)  
 62.IAF      *Wyllie v. State*, 445 So.2d 958 (Ala. Crim. App. 1983)  
 63.IF      *Scott v. State*, 414 So.2d 177 (Ala. Crim. App. 1982)  
 64.IF      *People v. Garcia*, 651 N.E.2d 100 (Ill. 1995)  
 65.I      *People v. Taylor*, 600 N.E.2d 9 (Ill. App. Ct. 1992)  
 66.FA      *People v. Lewis*, 594 N.E.2d 414 (Ill. App. Ct. 1992)  
 67.      *People v. Smalley*, 621 N.E.2d 7 (Ill. App. Ct. 1991)  
 68.I      *People v. Lindsay*, 550 N.E.2d 719 (Ill. App. Ct. 1990)  
 69.I      *People v. Berry*, 529 N.E.2d 1001 (Ill. App. Ct. 1988)  
 70.I      *People v. McVay*, 524 N.E.2d 635 (Ill. App. Ct. 1988)  
 71.IF      *People v. Falconer*, 522 N.E.2d 903 (Ill. App. Ct. 1988)  
 72.I      *People v. Hall*, 513 N.E.2d 429 (Ill. App. Ct. 1987)  
 73.I      *People v. Dare*, 488 N.E.2d 1304 (Ill. App. Ct. 1986)  
 74.A      *People v. Holloway*, 475 N.E.2d 915 (Ill. App. Ct. 1985)  
 75.I      *People v. Lynom*, 423 N.E.2d 1281 (Ill. App. Ct. 1981), *rev'd in part on other grounds*, 440 N.E.2d 126 (Ill. 1982)  
 76.A      *People v. Purazzo*, 420 N.E.2d 461 (Ill. App. Ct. 1981)  
 77.A      *People v. Bacon*, 415 N.E.2d 678 (Ill. App. Ct. 1980)

V. OTHER (4 Total; 1 I's)

- 78.FA      *Breckenridge v. State*, 628 So.2d 1012 (Ala. Crim. App. 1993)  
 79.A      *Barnett v. State*, 540 So. 2d 810 (Ala. Crim. App. 1988)  
 80.I      *People v. Ishmael*, 466 N.E.2d 1334 (Ill. App. Ct. 1984)

## MIXED STATES: CALIFORNIA AND MINNESOTA

## I. Departure (7 Total; 6 I's)

- 1.I      People v. Rupe, 256 Cal. Rptr. 126 (Ct. App. 1988)
- 2.I      People v. McCowan, 227 Cal. Rptr. 23 (Ct. App. 1986)
- 3.I      People v. Ogen, 227 Cal. Rptr. 16 (Ct. App. 1985)
- 4.I      People v. Morrall, 192 Cal. Rptr. 601 (Ct. App. 1983)
- 5.I      State v. Shannon, 514 N.W.2d 790 (Minn. 1994)
- 6.A      State v. Koop, 380 N.W.2d 493 (Minn. 1986), *rev'g* 375 N.W.2d 491 (Minn. Ct. App. 1985)
- 7.I      State v. Falvey, 1993 Minn. App. LEXIS 737 (Minn. Ct. App. July 27, 1993)

## II. SEPARATION AND INFIDELITY (20 Total; 12 I's)

- 8.I      People v. Arcega, 651 P.2d 338 (Cal. 1982)
- 9.A      People v. Neasman, 17 Cal. Rptr. 2d 452 (Ct. App. 1993)
- 10.      People v. Morales, 7 Cal. Rptr. 2d 358 (Ct. App. 1992)
- 11.      People v. Huynh, 281 Cal. Rptr. 785 (Ct. App. 1991)
- 12.A      People v. Marmaduke, 280 Cal. Rptr. 594 (Ct. App. 1991), *review granted and opinion superseded by* 813 P.2d 652 (Cal. 1991), *review dismissed by* 824 P.2d 568 (Cal. 1992)
- 13.I      People v. Walsh, 245 Cal. Rptr. 862 (Ct. App. 1988)
- 14.I      People v. Thompkins, 240 Cal. Rptr. 516 (Ct. App. 1987)
- 15.I      People v. Thompkins, 240 Cal. Rptr. 516 (Ct. App. 1987) (same case, different victim)
- 16.I      People v. Campbell, 239 Cal. Rptr. 214 (Ct. App. 1987)
- 17.A      People v. Hyde, 212 Cal. Rptr. 440 (Ct. App. 1985)
- 18.I      People v. Pickett, 210 Cal. Rptr. 440 (Ct. App. 1985)
- 19.I      People v. Levitt, 203 Cal. Rptr. 276 (Ct. App. 1984)
- 20.I      People v. Levitt, 203 Cal. Rptr. 276 (Ct. App. 1984) (same case, different victim)
- 21.I      People v. Spurlin, 202 Cal. Rptr. 663 (Ct. App. 1984)
- 22.A      People v. Spurlin, 202 Cal. Rptr. 663 (Ct. App. 1984) (same case, different victim)
- 23.I      State v. Thunberg, 492 N.W.2d 534 (Minn. 1992)
- 24.A      State v. Gore, 451 N.W.2d 313 (Minn. 1990)
- 25.A      State v. Christianson, 361 N.W.2d 30 (Minn. 1985) (en banc)
- 26.I      State v. Larsen, 413 N.W.2d 584 (Minn. Ct. App. 1987)
- 27.I      State v. Johnsen, 364 N.W.2d 494 (Minn. Ct. App. 1985)

## III. SIMPLE INFIDELITY (1 Total; 1 I)

- 28.I      State v. Bettin, 1995 Minn. App. LEXIS 931 (Ct. App. July 11, 1995)

## IV. PHYSICAL VIOLENCE (19 Total; 14 I's)

A. *Physical Violence and Separation* (5 Total; 1 I's)

- 29.I      *People v. Aguilar*, 267 Cal. Rptr. 879 (Ct. App. 1990)
- 30.A      *State v. Merrill*, 428 N.W.2d 361 (Minn. 1988) (en banc)
- 31.A      *State v. Edge*, 422 N.W.2d 315 (Minn. 1988)
- 32.A      *State v. Falvey*, 1993 Minn. App. LEXIS 737 (Minn. Ct. App. July 27, 1993)
- 33.A      *State v. Taylor*, 1991 Minn. App. LEXIS 1227 (Minn. Ct. App. Dec. 13, 1991)

B. *Physical Violence, Separation, and Infidelity* (5 Total; 4 I's)

- 34.AF     *People v. Wickersham*, 650 P.2d 311 (Cal. 1982)
- 35.IF     *People v. Adams*, 192 Cal. Rptr. 290 (Ct. App. 1983)
- 36.I      *State v. Moore*, 458 N.W.2d 90 (Minn. 1990), *appeal after remand*, 481 N.W.2d 355 (Minn. 1992)
- 37.I      *State v. Hanson*, 405 N.W.2d 467 (Minn. 1987)
- 38.I      *State v. Gurske*, 424 N.W.2d 300 (Minn. Ct. App. 1988)

C. *Physical Violence* (9 Total; 9 I's)

- 39.I      *People v. Wharton*, 809 P.2d 290 (Cal. 1991)
- 40.I      *People v. Bloyd*, 729 P.2d 802 (Cal. 1987)
- 41.IF     *People v. Webb*, 32 Cal. Rptr. 2d 582 (Ct. App. 1994)
- 42.IF     *People v. Day*, 2 Cal. Rptr. 2d 916 (Ct. App. 1992)
- 43.IF     *People v. Aris*, 264 Cal. Rptr. 167 (Ct. App. 1989)
- 44.I      *People v. Henderson*, 223 Cal. Rptr. 741 (Ct. App. 1986)
- 45.IF     *People v. Day*, 220 Cal. Rptr. 330 (Ct. App. 1985)
- 46.I      *People v. Birreuta*, 208 Cal. Rptr. 635 (Ct. App. 1984)
- 47.I      *State v. Lindberg*, 408 N.W.2d 589 (Minn. Ct. App. 1987)

## IV. OTHER (6 Total; 2 I's)

- 48.A      *State v. Cuypers*, 481 N.W.2d 553 (Minn. 1992)
- 49.       *State v. Hale*, 453 N.W.2d 704 (Minn. 1990)
- 50.I      *State v. Werman*, 388 N.W.2d 748 (Minn. 1986)
- 51.I      *State v. Schmit*, 329 N.W.2d 56 (Minn. 1983)
- 52.A      *State v. Hoffman*, 328 N.W.2d 709 (Minn. 1982)
- 53.A      *State v. Phelps*, 328 N.W.2d 136 (Minn. 1982)